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HEARINGS  
BEFORE THE  
SUBCOMMITTEE ON  
INTERGOVERNMENTAL RELATIONS  
OF THE  
COMMITTEE ON  
GOVERNMENT OPERATIONS  
AND THE  
SUBCOMMITTEES ON SEPARATION OF POWERS  
AND  
ADMINISTRATIVE PRACTICE AND PROCEDURE  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
NINETY-THIRD CONGRESS  
FIRST SESSION  
ON  
S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106,  
S. 1142, S. 1520, S. 1923, and S. 2073

APRIL 10, 11, 12; MAY 8, 9, 10, AND 16, 1973

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# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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TUESDAY, APRIL 10, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE, COMMITTEE ON THE JUDI-  
CIARY,

*Washington, D.C.*

The subcommittees met, pursuant to notice, at 10 a.m., in room 3302, Dirksen Senate Office Building, Senator Edmund S. Muskie presiding.

Present: Senators Muskie, Ervin, Kennedy, Chiles, Mathias, Thurmond, Gurney, and Roth.

Also present: Alvin From, staff director; Alfred Friendly, Jr., counsel; Dorothy J. Kornegay, secretary; and Lucinda T. Dennis, chief clerk, of the Subcommittee on Intergovernmental Relations.

Rufus L. Edmisten, chief counsel and staff director; Walker F. Nolan, counsel, Joe Pecore, assistant counsel; Telma Moore, executive assistant; and Arthur S. Miller, consultant, of the Subcommittee on Separation of Powers.

Thomas M. Susman, assistant counsel, of the Subcommittee on Administrative Practice and Procedure.

Senator MUSKIE. The committee will be in order.

This morning we begin a series of hearings on the subject of executive privilege and Government secrecy.

It is very unusual in many respects, and one of those is that we are combining the interests and the jurisdiction and the background of three subcommittees in the course of those hearings; the Subcommittee on the Separation of Powers, headed by Senator Ervin; the Subcommittee on Administrative Practice and Procedure, headed by Senator Kennedy; and the Subcommittee on Intergovernmental Relations, which I am privileged to chair.

So I think it is appropriate that we ask Senator Ervin to begin these hearings with an opening statement. But before we do that, I think we should incorporate in the record the texts of the legislation we will be discussing, and also any other pertinent data.

## OPENING STATEMENT OF SENATOR ERVIN

Senator ERVIN. Mr. Chairman, I think it is well that these hearings be held to clarify a situation which has constantly, and with increasing frequency, hampered the Congress in its efforts to obtain

information from the executive branch of the Government necessary to enable it to perform its legislative functions.

I have a prepared statement which I would like to put into the record and then briefly summarize certain observations.

The Subcommittee on Separation of Powers recently conducted a survey among every Senate and House committee and subcommittee to ascertain the frequency with which committees and subcommittees have been denied access to information by the executive branch of the Government, since January of 1964.

Our survey is not yet complete, but it has thus far turned up 130 instances in which a congressional committee or subcommittee has sought in vain to obtain information from the executive branch of the Government.

I had several experiences of that kind when I was holding hearings on the use of military intelligence to exercise surveillance over civilians who were merely exercising their first amendment rights to assemble and petition Government for redress of grievances. I was informed by the Secretary of Defense, that he thought it was his prerogative to determine the identity of the witnesses from whom we were to receive information about his department in that connection.

Then I received a letter from the General Counsel of the Department of Defense to the effect he didn't think my subcommittee needed the information we were seeking, and on another occasion a letter to the effect that he didn't think the American people were entitled to know what the committees were attempting to obtain from the Department.

I might state that in these instances it was very difficult even to get an answer from the General Counsel of the Department of Defense, who, like myself, is a Southerner. I am satisfied that if he had been in command of Lee's army in Petersburg at the close of the war that the conflict would still be lasting, because he was very skillful in the art of obstruction.

There are some very interesting observations on executive privilege made by Bernard Schwartz in his book entitled, "Federal and State Powers," on pages 145 to 148. He says it is not surprising that there has been a plethora of Attorney General decisions which have invariably supported the claims of the executive to withhold information. He further states categorically that there is no Supreme Court decision setting this matter at rest. He also states that the only judicial opinion that really deals with the subject is the decision of the Supreme Judicial Court of Massachusetts where the chairman of the Massachusetts Development and Industrial Commission claimed the right to withhold information from the Massachusetts State Senate. In that case, the Supreme Judicial Court of Massachusetts said that if the legislative department were to be shut off in the manner proposed from access to the papers and records of executive and administrative departments, boards, and commissions, it could not properly perform its legislative functions.

Mr. Schwartz also makes a very penetrating observation. He says that in political, as in natural science, nature abhors a vacuum, and that if Congress does not assert its power in this field, the executive undoubtedly will occupy it.

I urge these subcommittees to come forth with some proposal which will enable Congress to assert its powers.



Now, there can be no doubt of the fact that Congress has the power to obtain information necessary to enable it to be sufficiently informed that it may act wisely. I would suggest that the staff put in the record the three decisions, one is the case of the *U.S. v. Burr*, which is reported in the 25 Federal cases at page 30.<sup>1</sup> This decision was handed down in 1807, and it is particularly appropriate now because we have had recent claims by the Executive that White House aides cannot be required to appear before a congressional committee and testify even in matters that are related to legislative functions. In this case, Burr was on trial before Chief Justice John Marshall in Richmond, Va., on a charge of treason.

Aaron Burr represented to the court that one of the principal witnesses that was missing was General Wilkinson who had written a letter to President Thomas Jefferson which he said would be contradictory to the testimony he was prepared to give at the trial. So Aaron Burr applied to Chief Justice Marshall for subpoena duces tecum to require Thomas Jefferson, President of the United States, to produce these letters at the trial in Richmond.

Chief Justice Marshall said it was unquestioned by anybody that a court had the power to issue a subpoena duces tecum for the President of the United States, and the only question was whether they could require President Jefferson to produce General Wilkinson's letters, and Chief Justice Marshall appeared and determined whether evidence could be obtained by the court by compulsory process, that the question was not the character of the witness but the character of the testimony, and so he held that the court had power to issue a subpoena duces tecum to require Thomas Jefferson, the President of the United States, to produce letters written to him by General Wilkinson which Aaron Burr contended would contradict General Wilkinson's testimony at trial. The subpoena was ordered issued, and then Thomas Jefferson took a very fine step which I think is essential if government is going to function properly. We are going to have to have a little oil of mutual understanding poured on the joints of the Constitution where one of the powers begins and another ends. So President Jefferson said they did not have to issue a subpoena on him and that he would produce the papers and any other papers that were relevant to the case; that he would see that they were produced, which is a magnificent example which has been as much honored in the breach as in the observance.

Now, I would like, in addition to having the *United States v. Burr* opinion in the record also to insert two other cases: *McGrain v. Daugherty* 273 U.S. 135, decided in 1927; and *Jurney v. McCracken*, 294 U.S. 125, which was decided in 1935.<sup>1</sup>

Senator MUSKIE. Without objection, so ordered.

Senator ERVIN. These cases lay down the proposition, first that Congress has the power to obtain information necessary to enable it to legislate wisely, either to determine whether it should legislate or refrain from legislating; and, second, they hold that the Congress can use compulsion to require production of testimony, that in the exercise of its powers congressional committees authorized by a supreme body can

<sup>1</sup> See Appendix, Volume III of these hearings, Executive Privilege, Part 4, Supreme Court Decisions.

issue a subpoena to require a witness to appear before a committee and give testimony, that if a witness disobeys his subpoena that a parent body, whether the House or Senate, can issue a warrant for arrest of the witness and bring him before the bar of the House in question and call for him to testify and if he fails to give the testimony then they can pass judgment. They can try him for contempt of the House in question; and it was held in the *McCracken* case they could actually imprison.

I hope that they will never have to resort to these drastic methods. When I had the privilege, along with Senator Saxbe of Ohio of arguing before the Supreme Court on behalf of the Senate in the *Gravel* case, Justice Douglas asked a question there that was relevant, owing to the fact that the case involved use of certain executive documents by Senator Gravel. Justice Douglas pointed out that most of the executive departments of the Government collect information at the expense of the American taxpayers, and he asked the question whether or not the executive branch of the Government could be said to have the same absolute title to the information it collects at the expense of the American taxpayers that he had in respect to the title to his automobile.

I read with much interest an article which you wrote, Senator Muskie, in the New York Times on Sunday, I believe it was, pointing out that one of the bills to codify the Federal criminal statutes, has in it certain provisions which attempt apparently to establish an Official Secrets Act similar to the British act. I rejoice that one who has such an interest as you is chairing the hearings.

I would recommend that we adopt some rule or recommend adoption of some rules by the Rules Committee and recommend enactment of a statute which will make certain that when Congress undertakes to use its legislative power to conduct an investigation for legislative purposes, that it will be a compulsory process to obtain the attendance of witnesses and the production of documents. I think it is high time that we clarified this procedure and not allow a vacuum to exist which can be used as an escape route by Government officials who may at the moment have overwhelming desire to win on this point and not testify or produce documents requested by Congress.

[The prepared statement of Senator Ervin follows:]

#### PREPARED STATEMENT OF SENATOR SAM J. ERVIN, JR.

We are meeting today to hold hearings on S. 858, S. 1142, and S.J. Res. 72, which relate to the so-called doctrine of "executive privilege", a practice which goes to the very heart of the separation of powers doctrine.

The Judiciary Subcommittee on Separation of Powers is sitting jointly with the Government Operations Subcommittee on Intergovernmental Relations, chaired by Senator Muskie. These hearings are in effect, a continuation of hearings on *Executive Privilege: the Withholding of Information by the Executive* held by the Subcommittee on Separation of Powers in July and August 1971.

The use of so-called executive privilege as a device by which the Executive withholds information from the Congress has given rise to increasing concern voiced by many Members of the Congress, especially in light of the recent hearings on the nomination of L. Patrick Gray as Director of the FBI and the impending investigation by the Select Committee on Presidential Campaign Activities.

As we are all aware, the failure or outright refusal of Federal officers and employees to produce information requested by the Congress for its use in carrying out its constitutional obligation to legislate has resulted in a serious erosion in the separation of powers principle embodied in the Constitution.

In an attempt to determine the extent to which departments and agencies of the Federal Government have refused to furnish to the Congress information re-



quested in the form of written documents or oral testimony, the Subcommittee on Separation of Powers several weeks ago embarked on an ambitious project: It made a detailed survey of every joint committee, committee, subcommittee of the Congress and the General Accounting Office. While the survey is not completed, *the subcommittee has received sufficient results to show that over one hundred and thirty specific instances of refusals to provide written information or testimony to the Committees of the Senate and House have occurred since January 1964.* These preliminary results of the survey show beyond peradventure that the executive branch has failed to furnish a substantial amount of the information the Congress has requested from executive departments and agencies. When the survey is completed I believe the evidence compiled will leave no doubt that Congress must devise some means to require executive departments and agencies to adhere to the Constitutional duty to furnish to the Congress the information it seeks.

For almost 6 years, the Senate Judiciary Subcommittee on Separation of Powers, which I am honored to serve as chairman, has studied the problems raised by so-called executive privilege, and in July 1971, the subcommittee conducted 5 days of hearings on the subject. At that time the subcommittee considered S. 1125, a bill introduced by Senator Fulbright, designed to limit the assertion of executive privilege. During those hearings, the subcommittee explored the conflict between the alleged power of the President to withhold information when he feels its disclosure would impede him in the conduct of his office, and the power of the legislative branch to obtain information needed to legislate wisely and effectively. The basic right of the tax-paying public to know what its Government is doing and the underlying facts upon which it bases its actions also were considered.

These basic interests have clashed repeatedly since President Washington's first term, when the Congress undertook to investigate the St. Clair expedition. Without objecting to the propriety of the investigation, President Washington's advisors concluded that, while the Congress might institute inquiries, and call for papers generally, and while the Executive ought to provide those that the public good would permit, the Executive nonetheless had the discretionary power to refuse to communicate any information the disclosure of which would injure the public. Despite this contention of his advisory, President Washington did turn over all of the requested papers to the Congress. Thus, the often-cited St. Clair incident by no means constitutes precedent for withholding of information from the Congress by the President or departments or agencies of the Federal Government.

There is little disagreement that the power to institute inquiries and exact information is integral to the congressional power to legislate—*McGrain v. Daugherty*, 273 U.S. 135 (1927). However, several Presidents have urged that the Chief Executive has the power to withhold information from the Congress and from the public, based upon Article II Section 3 of the Constitution, which requires the President to see that the "laws are faithfully executed". Chief Executives have argued that a certain amount of secrecy is mandatory to give the President the necessary autonomy to discharge his duties. Since he cannot exercise all of his powers alone, it is urged that there is a derivative power applicable to all the members of the executive branch, an assertion that is even more devastating to the checks-and-balances principle.

In 1962, President Kennedy attempted to end the practice of delegating to employees the authority to claim executive privilege. In his March 7, 1962, letter to the House Special Government Information Subcommittee of the Government Operations Committee, President Kennedy stated that the basic policy of his administration on the question of executive privilege would be that only the President could invoke executive privilege, and that the privilege would not be used "without specific Presidential approval." Presidents Johnson and Nixon reaffirmed in writing this policy of limited exercise of executive privilege. Nevertheless, this theoretical control over the withholding of information does not operate satisfactorily in practice, and over the years Congress has encountered numerous instances of withholding of information essential in carrying out its constitutional powers.

Even if these Presidential policy statements were to operate as well in practice as in theory, it still would be notable that the practice of executive privilege has developed subject to the will or whim of each succeeding President, and that there has been no legislative enactment relating to its existence or exercise, nor have there been any definitive judicial decisions. The result has been that the formal or informal withholding of information from the Congress has become part



and parcel of the growing power of the executive branch vis-a-vis the Congress.

This shifting of power away from the legislative branch and into the hands of the Executive has come about primarily from the failure of the Congress to assert and exercise its constitutional powers. This, in conjunction with the almost unlimited delegation of authority to the bureaucracy, has placed the Congress in the position of being the chief aggrandizer of the Executive. The resulting increase in executive power has come close to creating "a government of men, not of laws."

Aside from the enormous problems that refusals to provide information pose in terms of the separation of powers principle, the practice contravenes an underlying assumption of the Constitution; namely, that the free flow of ideas and information and the open and full disclosure of the governing process is essential to the operation of our democratic form of government. Any lessening in available information results in lessened citizen participation, and in a virtual absence of accountability on the part of those who govern. Thus, it is plain that the exercise of the assumed power of executive privilege undergirds the growing policy of governmental secrecy that is so inimical to our freedoms.

Despite growing objections to this unwarranted use of executive power, the past months have seen no letup; indeed, in February, during the hearings which the Subcommittee on Separation of Powers conducted in conjunction with an ad hoc subcommittee of the Government Operations Committee, it appeared that Secretary of Agriculture Butz and Administrator William Ruckelshaus of the Environmental Protection Agency, under the direction of the Administration, would refuse to come and testify on the subject of executive impoundment of funds appropriated for programs to be carried out by their respective departments. Only after the subcommittees made it plain that the testimony of the two government witnesses was essential to the inquiry and that they were prepared to issue subpoenas, if necessary, did the administration decide that it would be appropriate for these two officials to appear and present the testimony requested.

Moreover, during the hearings held in the last Congress by my Subcommittee on Constitutional Rights on the reprehensible practice of Army surveillance over civilians, the subcommittee repeatedly requested information, documents, and the testimony of certain military officers. However, the subcommittee was refused consistently on the ground, inter alia, that it had no need for the information or testimony requested, but at no time was the doctrine of executive privilege formally invoked by the President. There are numerous similar instances involving the heads of Federal departments and agencies.

Even the hearings today have not been spared of administration refusals to offer pertinent testimony. In a letter dated March 23, 1973, Mr. Roy L. Ash, Director of the Office of Management and Budget, refused a request to appear before these subcommittees on the grounds that "... the questions raised by the subjects of executive privilege and freedom of information are essentially legal in nature ... therefore, there is nothing of real substance which I could add to the testimony you will receive from the Department of Justice."

In light of the position Mr. Ash occupies, at the very pinnacle of power over budgetary information, and his astonishing statements before the hearing in February, concerning the withholding of budgetary information, Senator Muskie and I thought his testimony would be most germane and beneficial to our exploration of the areas of policy concerning the handling, protection, and disclosure of information controlled by government officials. So, here, we witness, first hand, a refusal by an administration official to testify. Such a refusal puts a congressional committee in the untenable and frustrating position of being unable to fully explore and analyze an administration practice which, I believe, goes counter to the intent of the Congress.

Thus, it is not the formal invocation of executive privilege alone that causes difficulty, but also the multitude of specious reasons given by the department and agency heads and other officers and employees of the Federal Government for their refusals to provide the information sought by Congress.

According to a story in the Washington Post, of March 3, 1973, the President stated at a press conference that he would invoke executive privilege if the Senate Judiciary Committee requested the appearance of his counsel, John W. Dean III, in regard to the nomination of L. Patrick Gray III to be the Director of the Federal Bureau of Investigation. Mr. Nixon reportedly stated, "No President could ever agree to allow the counsel to the President to go down and testify before a committee," making no distinction whatever between the various types of information that might be sought from such a person. While I recognize that there is a need for a President to seek counsel and advice from his closest

staff members, and that such conversations on certain occasions necessarily must be kept confidential, it appears to me that the President's broadside statement that no President could ever agree to allow his counsel to testify, goes well beyond any past precedent and usage of so-called executive privilege, and is in total contradiction with the opinion of his Counsel, Mr. Dean, as indicated in a letter to Dr. Jeremy Stone of the Federation of American Scientists on April 20, 1972, when he stated that *the "precedents indicate that no recent President has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject". And then we learned that he had expanded this prohibition to include even former aides who are no longer connected with the White House.*

The President's recent interpretation of executive privilege appears to be based on the assumption that White House aides constitute a new nobility, immune from publicly testifying under oath as all other citizens are required to do. It has always been my belief that in our country divine right went out with the American revolution; and that clearly it does not belong to White House aides.

It is clear that the President, and agency and department heads and employees, are making unilateral decisions regarding the information that the Congress is allowed to obtain in carrying out its constitutional duty to legislate and to approve Presidential appointments. Further, these unilateral determinations appear to be made with no reasonable discriminatory ground rules. I believe that the Congress and the President must cooperate in seeing that the American people receive the informed governance that they deserve and the fullest possible information regarding the operations of their Government, and that those who govern must, in turn, be accountable to the taxpayers.

In view of the continued reluctance of the President and employees and officials of Federal departments and agencies to provide the Congress with the information which it must have in order to legislate intelligently, I believe it is essential that the Congress adopt some means of determining whether such refusals are justified, and, if they are not, that the information will be forthcoming.

S.J. Res. 72, which I introduced on March 8, 1973, is an attempt to permit the Congress to determine whether it requires information or testimony from the executive branch of the Government. If the President decrees that an agency or department head shall not come forward and testify or produce the documents sought, then he has the burden of showing the Congress that his refusal is well taken. Under the provisions of this resolution, the Congress will not again find itself in the belittling role of having to beg and lobby executive departments and agencies for information which it needs to legislate wisely under its constitutional mandate.

The measures introduced by my colleagues, Senator Muskie and Senator Fulbright, also are steps toward restoring to the Congress its rightful role under the Constitution and the separation of powers doctrine.

With the present inquiry of the Select Committee on Presidential Campaign Activities, it is, in my judgment, of the utmost necessity for the executive branch to cooperate with Congress in all honesty and candor. Presently, the President's refusal to cooperate presents his office in such a way as to reasonably engender in the minds of the American people the suspicion that he is afraid of the truth.

At issue in these hearings, then, are three conflicting principles: the alleged power of the President to withhold information the disclosure of which he feels would impede the performance of his office; the power of the legislative branch to obtain information in order to legislate wisely and effectively; and the basic right of the taxpaying public to know what its Government is doing.

These opposing principles have clashed for many years while the executive branch has been developing so-called "precedents" justifying its practice of the doctrine. To my mind, precedents do not legitimize practices which are without legal or constitutional basis. In the words of a colleague, "usurpation is not legitimized simply by repetition, nor is a valid power nullified by failure to exercise it".

The Congress has inflicted upon itself a condition of "institutional anemia", draining itself of obligations prescribed by the Constitution. It is high time that we, in Congress, accept our responsibilities and reclaim those which we have parceled away, so that we may become a more vital force in the determination of the national priorities and so that we may once again be heralded by the people as "the most glorious gem in the crown of democracy."

It is mandatory for the survival of our system of government that we take all reasonable measures to ensure that the separation of powers principle survives, for if it does not, the basis of our freedoms will have retreated into history.



Senator MUSKIE. Thank you very much, Senator Ervin.

I think Congress and the country are indebted to you for the work and the study and the hearings which you have been involved in over recent years on this whole question, and so I am thankful for the privilege to be associated with you in this hearing.

#### OPENING STATEMENT OF SENATOR MUSKIE

I have a brief statement I would like to make for the purpose of laying out some of the questions I think are involved in these hearings. Then I would like Senator Kennedy to make his opening statement.

Until now democracy in America has operated on the presumption that the more the people know about the Government the greater will be their involvement in and trust for its conduct. This presumption is now under heavy attack.

In these hearings we seek to reaffirm that basic presumption and to restore the proper balance between confidentiality and candor. We must begin by examining the President's recent definition of executive privilege as extending from his person to all advice and assistance from members of his personal staff. He said their full and frank counsel "must not be inhibited by the possibility that it will ever become a matter of public debate, either during their tenure in Government or at a later date."

He said his personal staff members, past or present, would decline requests for formal congressional testimony, and that a Cabinet officer who also serves as a personal adviser would comply with such requests provided that the performance of his duties would not be seriously impaired thereby.

That assertion of privilege is so sweeping as to suggest the need for a procedure reaffirming the right of Congress, and if necessary, the courts, to review individual claims of privilege that are made. Without such a review a President would become the sole judge in his own case, capable of denying vital information to the public, and the separation of powers with each branch of government equal would become a parody of Orwell's "Animal Farm" where some are more equal than others.

Then we must give our attention to new administration proposals to which Senator Ervin has referred to revise our legal definition of offenses involving national security.

If there is no objection I would like to insert in the record at this point those proposals in S. 1400 as well as the article in the New York Times of yesterday to which Senator Ervin has referred, and the Times editorial today because they raise some of the serious questions which I have.

As I see these proposals some of them would specify offenses where the law now sees no criminal behavior, whether by design or inadvertence. We will attempt to find out which. The administration proposals appear so broad as to weaken first amendment protection for free debate, particularly that essential debate which develops public support for important policy decisions about defense and foreign affairs. Laws which might curtail that debate or limit official information to disclosure by press release deserve intense scrutiny. Ours will begin here.

Third, we are to hear evidence that a law designed to insure public access to government information is being misused to deter inquiry and



to deny access. The Freedom of Information Act of 1967 has been subjected to curious interpretation by agencies which have used its provisions to withhold information instead of to make it known.

I have proposed both procedural and substantive changes in the law to insure that its true intent is no longer thwarted, and our subcommittees will act on those proposals.

It is more than ironic that we begin these hearings faced with the refusal of a key witness to testify. Roy Ash, Director of the Office of Management and Budget, has deferred to the Justice Department to present the administration's views on all matters relating to freedom of information.

He has refused the request Senator Ervin and I made that he appear here personally. We find his refusal unacceptable. It denies us his agency's expertise both on the availability of budgetary information to the Congress and on administrative practices of all agencies implementing the Freedom of Information Act.

Mr. Ash did not invoke executive privilege. He did not claim that his schedule was too heavy to permit him to appear. He simply said he could not contribute helpfully to our discussion.

I can only respond that the Director of the Office of Management and Budget has important responsibilities in the field of our inquiry and should be in a position to contribute a great deal to our discussion. Perhaps as our hearings proceed Mr. Ash will come to appreciate the significance of his role. We will see to it that he receives copies of the testimony other witnesses give us on the role of his office in setting policy on public information, and we will hope that on reflection he sees the importance of responding in the future to questioning he now prefers to evade.

EXCERPT FROM S. 1400 "A BILL TO REFORM, REVISE, AND CODIFY THE CRIMINAL LAW OF THE UNITED STATES," INTRODUCED MARCH 27, 1963

#### "§1121. ESPIONAGE

"(a) OFFENSE.—A person is guilty of an offense, if, with intent that information relating to the national defense be used, or with knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he knowingly:

- "(1) communicates such information to a foreign power;
- "(2) obtains or collects such information for a foreign power or with knowledge that it may be communicated to a foreign power; or
- "(3) enters a restricted area with intent to obtain or collect such information for a foreign power or with knowledge that it may be communicated to a foreign power.

"(b) GRADING.—An offense described in this section is:

- "(1) a Class A felony:
  - "(A) if committed in time of war or during a national defense emergency; or
  - "(B) if the information directly concerns nuclear weaponry; military space craft or satellites; early warning systems or other means of defense or retaliation against large scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy;
- "(2) a Class B felony in any other case.

#### "§ 1122. DISCLOSING NATIONAL DEFENSE INFORMATION

"(a) OFFENSE.—A person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it.

“(b) GRADING.—An offense described in this section is:

“(1) a Class C felony if committed during time of war or during a national defense emergency;

“(2) a Class D felony in any other case.

“§ 1123. MISHANDLING NATIONAL DEFENSE INFORMATION

“(a) OFFENSE.—A person is guilty of an offense if:

“(1) being in possession or control of information relating to the national defense, he recklessly permits its loss, destruction, or theft or communication to a person not authorized to receive it;

“(2) being in authorized possession or control of information relating to national defense:

“(A) he intentionally fails to deliver it on demand to a federal public servant authorized to demand it;

“(B) he knowingly fails to report promptly, to the agency authorizing him to possess or control such information, its loss, destruction, or theft, or communication to a person not authorized to receive it, or

“(C) he recklessly violates a duty imposed upon him by a statute or executive order, or by a regulation or a rule of the agency authorizing him to possess or control such information, which statute, order, regulation, or rule is designed to safeguard such information; or

“(3) being in possession or control of information relating to the national defense which he is not authorized to possess or retain, he knowingly fails to deliver it promptly to a federal public servant entitled to receive it.

“(b) GRADING.—An offense described in this section is:

“(1) a Class E felony in the circumstances set forth in subsection (a) (2)

(C);

“(2) a Class D felony in any other case.

“§ 1124. DISCLOSING CLASSIFIED INFORMATION

“(a) OFFENSE.—A person is guilty of an offense if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he knowingly communicates such information to a person not authorized to receive it.

“(b) EXCEPTIONS TO LIABILITY AS AN ACCOMPLICE OR CONSPIRATOR.—A person not authorized to receive classified information is not subject to prosecution as an accomplice within the meaning of section 401 for an offense under this section, and is not subject to prosecution for conspiracy to commit an offense under this section.

“(c) DEFENSE.—It is a defense to a prosecution under this section that the information was communicated only to a regularly constituted committee of the Senate or the House of Representatives of the United States, or a joint committee thereof, pursuant to lawful demand.

“(d) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the classified information was improperly classified at the time of its classification or at the time of the offense.

“(e) GRADING.—An offense described in this section is:

“(1) a Class D felony if the person to whom the information is communicated is an agent of a foreign power;

“(2) a Class E felony in any other case.

“§ 1125. UNLAWFULLY OBTAINING CLASSIFIED INFORMATION

“(a) OFFENSE.—A person is guilty of an offense if, being an agent of a foreign power, he knowingly obtains or collects classified information which, in fact, he is not authorized to receive.

“(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the classified information was improperly classified at the time of its classification or at the time of the offense.

“(c) GRADING.—An offense described in this section is a Class D felony.

“§ 1126. DEFINITIONS FOR SECTIONS 1121 THROUGH 1125

“As used in sections 1121 through 1125:

“(a) ‘authorized,’ when used in relation to the receipt, possession, or control of classified information or information relating to the national



defense, means with authority to have access to, to receive, to possess, or to control such information as a result of the provisions of a statute or executive order, or a regulation or rule thereunder;

"(b) 'classified information' means any information, regardless of its origin, which is marked or designated pursuant to the provisions of a statute or executive order, or a regulation or rule thereunder, as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security;

"(c) 'communicate' means to impart information, to transfer information, or otherwise to make information available by any means, to a person or to the general public;

"(d) 'communications intelligence information' means information:

"(1) regarding any procedures and methods used by the United States or any foreign power in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use, by the United States or a foreign power in the interception of communications and the obtaining of information from such communications by other than the intended recipients; or

"(3) obtained by use of the procedures or methods described in paragraph (1), or by a device or apparatus described in paragraph (2);

"(e) 'cryptographic information' means information:

"(1) regarding the nature, preparation, use or interpretation of a code, cipher, cryptographic system, or any other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications, whether of the United States or a foreign power;

"(2) regarding the use, design, construction, maintenance, or repair of a device or apparatus used, or prepared or planned for use, for cryptographic purposes, by the United States or a foreign power; or

"(3) obtained by interpreting an original communication by the United States or a foreign power which was in the form of a code or cipher or which was transmitted by means of a cryptographic system or any other method of any nature used for the purpose of disguising or concealing the contents or significance or means of communications;

"(f) 'information' includes any property from which information may be obtained;

"(g) 'information relating to the national defense' includes information, regardless of its origin, relating to:

"(1) the military capability of the United States or of an associate nation;

"(2) military planning or operations of the United States;

"(3) military communications of the United States;

"(4) military installations of the United States;

"(5) military weaponry, weapons development, or weapons research of the United States;

"(6) restricted data as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014);

"(7) intelligence of the United States, and information relating to intelligence operations, activities, plans, estimates, analyses, sources, and methods, of the United States;

"(8) communications intelligence information or cryptographic information as defined in subsection (d) or (e);

"(9) the conduct of foreign relations affecting the national defense; or

"(10) in time of war, any other matter involving the security of the United States which might be useful to the enemy;

"(h) 'restricted area' means any area of land, water, air, or space which includes any facility of the United States, or of a contractor or subcontractor with or for the United States, to which access is restricted pursuant to a statute or executive order, or a regulation or rule issued pursuant thereto, for reasons of national defense."

[From the New York Times, Apr. 9, 1973]

IN THE SMALL PRINT, AN "OFFICIAL SECRECY ACT"

*(These are excerpts from a speech delivered April 1 by Senator Edmund S. Muskie, Democrat, of Maine, at Frostburg State College.)*

(By Edmund S. Muskie)

Frostburg, Md.—We are tangled in angry and important disputes about Presidential and Congressional power, about spending and taxation, about social needs and governmental indifference, about the whole structure of our Federal system and about the integrity of our political process.

And to those disputes we must now add a new one brought on by this Administration's latest attempt to stifle the flow of official information to the public. The attempt is hidden deep in a lengthy and complex legislative proposal (S.1400) introduced in the Congress as a revision of the Federal Criminal Code. Five sections of that proposal, taken together, would establish in peacetime a system of Government censorship that a democracy could hardly tolerate in a time of war.

The "official secrets act" being proposed would punish Government officials who disclosed almost any kind of defense and foreign policy information, whether or not its disclosure would endanger national security.

It would punish newsmen who received such information unless they promptly reported the disclosure and returned the material to a Government official.

It would punish not only reporters but all responsible officials of their publications or broadcasting companies who participated in making the unauthorized information public.

It would punish Government employees who knew of a colleague's unauthorized disclosure and failed to report their co-worker's action.

The law's penalties—from three to seven years in jail, from \$25,000 to \$50,000 in fines—would be imposed on actions which are not now considered crimes, which are, instead, the applauded work of investigative journalists.

For instance, part of the law would make any unauthorized disclosure of what is called classified information a crime.

And the law would explicitly prevent officials who disclosed such information from defending their action by proving that the information was improperly classified.

Well, what is classified information? According to the Administration proposal, it is "any information, regardless of its origin, which is marked or designated pursuant to the provisions of a statute or executive order or a regulation or rule thereunder, as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security."

On its surface, that language sounds reasonable, it does what existing law already does by insuring secrecy of data about our defense codes, about our electronic surveillance techniques, about military installations and weapons, about our atomic secrets and about plans and operations which might aid our enemies. All that information is already kept secret by laws which punish its disclosure with intent to damage America and its security.

But this new law would go further. It would prohibit and penalize disclosure of any classified information, regardless of whether or not it damaged security.

Classified information, you should know, is any document or record or other material which any one of over 20,000 Government officials might have decided—for reasons they need never explain—should be kept secret. It is any piece of paper marked top secret, secret or confidential, because someone, sometime, supposedly decided that its disclosure could prejudice the defense interests of the nation.

In practice, however, classified information is material which some individual in the Government decides he does not want made public. He could make that decision to hide incompetence. Many have.

He could be trying to conceal waste. Many have.

He could even be attempting to camouflage corrupt behavior and improper influence. Many have.

He could simply be covering up facts which might embarrass him or his bosses. Many have.

Classified information is the 20 million documents the Pentagon's own most experienced security officer has estimated to be in Defense Department files. Classified information is the 26-year backlog of foreign policy records in the State Department archives.



And most of that information is improperly classified—not out of evil motives, but out of a mistaken interpretation by conscientious employees of what security actually requires. They do not limit the use of secrecy stamps just to information which would really affect our national defense, if disclosed. They often use them simply to keep material out of the newspapers—to make it a little harder, perhaps, for a foreign nation to get the information, whether the information is defense-related or not.

Let me give you a few examples.

Around 1960, a sign in front of a monkey cage in the National Zoo explained that the monkey on display was a research animal who had traveled into space in American rockets. But at the same time the Pentagon was classifying all information that showed we were using monkeys in space.

The reason given for trying to keep the information secret was someone's concern that it might damage our relationships with India where some religious sects worship monkeys.

Another example deals with India. Over a year ago when India and Pakistan were at war over the independence of Bangladesh, the Nixon Administration insisted in public that it was not interfering in the conflict, that it was trying to be neutral. But Jack Anderson revealed classified information that proved that President Nixon had instructed Mr. Kissinger and others to "tilt" toward Pakistan. That information was being kept secret to conceal a lie.

India and Pakistan knew the truth. Only Americans were being deceived.

Similarly, a laboratory at M.I.T. prepared an assembly manual last February for a gyroscopic device used in missiles. Again the Air Force classified the manual and put the following words on its front page: "Each section of this volume is in itself unclassified. To protect the compilation of information contained in the complete volume, the complete volume is confidential."

And then in 1969 it was disclosed that someone in the Navy Department was clipping newspaper articles that contained facts that were embarrassing to the Navy, pasting those articles onto sheets of paper and stamping the paper secret. It turned out that such a practice was common throughout the Defense Department.

If newspaper articles can be stamped secret as a matter of course, what else is systematically being hidden from the public? Should this Administration proposal become law, you and I will never know the answer to that question.

The examples I have given should indicate to you the folly of any blanket prohibition against the disclosure of classified information, as long as our system of classification is so erratic, arbitrary and unmanageable.

Not only would the proposed law perpetuate the widespread abuses of secrecy I have listed, it would enforce public ignorance by making criminals out of honest men and women who put the public interest above bureaucratic secrecy. Indeed, the Administration's proposed secrecy law goes far beyond protection of what might be legitimate secrets as determined by a workable classification system, should one be developed.

Additionally, it would punish the unauthorized disclosure of "information relating to the national defense . . . regardless of its origin" which relates, among other things, to "the conduct of foreign relations affecting the national defense." That broad definition could bar intelligent public scrutiny of America's most significant foreign policy decisions.

What could the enactment of such a sweeping gag rule mean to the flow of information to the public?

For one thing, the proposed law would mean that Robert Kennedy, were he alive and writing now, would risk prosecution for publishing in his book, "Thirteen Days," the secret cable Nikita Khrushchev sent the White House during the Cuba missile crisis of October, 1962.

It would mean that Seymour Hersh of The New York Times could not write, as he did last year, about the still-classified Peers Report—the Army's own investigation of the My Lai massacre and the responsibility of Army officers for concealing the facts of that event.

It would mean that knowledgeable and conscientious Government employees could be brought to trial for telling newsmen about waste in defense contracts, or about fraud in the management of the military P.X. system.

It could mean denying the public the information necessary to understand how cost estimates on 47 weapons systems rose by over \$2 billion between March 31 and June 30 last year.

Thus, the Administration's official secrets act would create staggering penalties for disclosure of information even when the information is totally misclassified

or classified only to prevent public knowledge of waste, error, dishonesty or corruption.

We already have the criminal sanctions we need against disclosure of true defense secrets. To expand the coverage of those penalties can only stifle the flow of important but not injurious information to the press and therefore to the public.

With the criminal penalties already in the law and with the proven record of responsible behavior by the great majority of Government employes and newsmen, the only purpose behind further expansion of the secrecy laws would be the effort to silence dissent within the Government and hide incompetence and misbehavior.

New penalties will not further deter espionage and spying. They will only harm those who want the public to know what the Government is doing.

Nothing could be better designed to restrict the news you get to the pasteurized jargon of official press releases than a law which would punish a newsmen for receiving sensitive information unless he returned the material promptly to an authorized official.

Nothing could damage the press more than a provision which would make a newsman an accomplice in crime unless he revealed the source of information disclosed to him.

The Administration proposal carries an even greater danger in the power it would give to the officials who now determine what shall be secret and what shall be disclosed. Not only would they be able to continue to make those decisions without regard to any real injury disclosure might cause, they would be empowered to prosecute anyone who defied their judgment. Their imposition of secrecy could not be reviewed in the courts. And a violation of their decision would be a crime involving not only Government employees but journalists as well.

The Justice Department proposal goes far beyond any laws we have had, even the emergency requirements of World Wars I and II. No law now gives the Government such power to prosecute newsmen not only for revealing what they determine the public should know but just for possessing information the Government says they should not have.

Under this proposal, a reporter who catches the Government in a lie, who uncovers fraud, who unearths examples of monumental waste could go to jail—even if he could show, beyond any question, that the Government had no right to keep the information secret and that its release could not possibly harm national defense.

This law then would force journalists to rely on self-serving press releases manufactured by timid bureaucrats—or risk going to jail for uncovering the truth.

It would force Government employees to spy on each other in a manner familiar in Communist or fascist states but abhorrent to our concept of an open democracy.

We have had enough of that abuse of secrecy in the attempts to hide the facts about our conduct in Vietnam from the American people. Official secrecy has even been used to keep back vital facts about Government meat inspection programs or pesticide regulations or drug tests or import restrictions or rulings that interpret income tax regulations.

[From the New York Times, Apr. 10, 1973]

## THE U.S. vs. THE PEOPLE

[Editorial]

The Nixon Administration has submitted to Congress the equivalent of an Official Secrets Act that could bring down an impenetrable curtain over virtually all governmental activities related to defense and foreign affairs. The proposed legislation would give to the executive branch and its huge army of officials iron-clad protection from public scrutiny.

The proposal is a nightmare threat to freedom of the press, to the people's right to know and to the very concept of government with the consent of the governed. It is all the more insidious because its provisions are buried in 336 pages of a Justice Department bill for revision of the Federal criminal code, a complicated and in the main highly technical and legalistic document.

\* \* \* \* \*

There is nothing complicated or legalistic, however, about the intent and the consequences of the code's section dealing with governmental secrecy. It would make it a felony, punishable by a fine up to \$50,000 and seven years' imprison-



ment, to disclose or communicate any governmental information concerning, among other things, "the conduct of foreign relations affecting the national defense." Penalties would also be applicable to Government employees, reporters and officials of newspapers and broadcasting companies who, if in possession of any such information, did not return it to the Government.

A further gag rule, applicable to present and former Government employees, would cover *all* classified documents, no matter how improperly they might be labeled, thereby seeking to give to some 20,000 functionaries the absolute power of censorship. It is censorship of a severity that has never in the nation's history been deemed wise or essential even in time of war.

The proposed new powers would give to the Government virtually unlimited license to shape foreign and defense policies in insulation from either Congress or the people. The effect could be to make all fiscal arrangements of the military industrial complex immune to public scrutiny. The proposal would render investigative reporting all but impossible, while making a criminal of the conscientious public servant who refused to conceal deceptive or wasteful practice as in the recent Fitzgerald and Rule cases.

\* \* \* \* \*

All this is censorship of a severity that has never in the nation's history been deemed wise, even in time of war. During World War I, Congress considered legislation which would have applied the Espionage Act to the press. At least twice more in the last twenty years Congress considered similar proposals. None of these bills, not one of which intruded in so sweeping a manner on First Amendment freedoms, was adopted. The United States did not need any such legislation in the past; it does not need it now.

These proposals represent not so much a revision of the criminal code as an effort to rewrite the First Amendment and subject the American people to a kind of guaranteed ignorance about the inner workings of their Government. Such censorship would, as Senator Edmund S. Muskie has warned, result in "the silence of democracy's graveyard."

Instead of protecting the nation's security, it would surely destroy access to information on which rest the foundations of popular government.

Senator MUSKIE. I would like now to invite Senator Kennedy—

Senator ERVIN. I wonder if Senator Kennedy would permit me to make a correction in the record. I stated that there were 130 instances of refusals on the part of the executive to produce information for congressional committees since 1964, according to the survey conducted by the Subcommittee on Separation of Powers. The figure is 160 instances since January 1964.

Senator MUSKIE. As I recall, Senator, only four of those instances were information withheld on a claim of executive privilege.

Senator ERVIN. In some of them, they just flatly refused.

Senator MUSKIE. We don't have the doctrine established on the other refusals as yet.

Senator KENNEDY. Thank you very much, Senator.

#### OPENING STATEMENT OF SENATOR KENNEDY

One of the central requirements of a democracy is the free and unfettered flow of information to the people. That is why we have the first amendment. Freedom of speech and freedom of the press are vital not merely to protect the journalist and public speaker, but more importantly to guarantee the public's access to ideas—to new ideas, to controversial ideas, to ideas that are critical of the holders of power. Without free access to information and ideas, democracy suffocates and dies.

Today with Government activities touching every aspect of our lives, from the food we eat to the cars we drive, and the gas we use to drive them, it is even more important than ever to know how and why and by whom decisions are being made. Only then do we respond to those decisions. Only then can the people judge them.

But unfortunately, as the Federal bureaucracy has grown, so too has its penchant for secrecy. The Freedom of Information Act does not deny that some narrowly defined categories of communication may remain secure from public disclosure. But the limited exemptions in that measure have been flagrantly misused by bureaucrats whose concern is only to save themselves and their agencies embarrassment and exposure. The door of Government has been slammed shut in the face of the average citizen and instead of information on why decisions are made, he is handed the latest public relations gobbledygook.

Instead of White House orchestrated campaigns to lay the blame on Congress for meat prices that skyrocket, the people would like to know more about why the Government's agriculture policies failed. Instead of the chorus of appointed Federal officials talking of a freespending Congress, we would like the public to be able to get more information about why the administration requests more billions for defense after a Vietnam pullout and a major arms control agreement. And we would like to get more information about why the Treasury Department is the only agency around town that can't find tax loopholes that need to be closed.

Open government, of course, not only benefits the public directly, by improving the public understanding of government decision-making, but it also benefits the public by keeping government honest. As Justice Brandeis observed, sunshine is the best disinfectant.

The Supreme Court said in 1968, "It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." Recent years have seen that marketplace crisscrossed by barriers. It is time we set about removing them.

As serious as the freeze on the public's right to know has been this administration's freeze on the Congress' right to know. Executive privilege is now being used to shield a White House counsel from testifying not about his conversations with the President, but about his alleged involvement in the planning and coverup of a criminal conspiracy.

The President has avowed that executive privilege will not be used "as a shield to prevent embarrassing information from being made available" to Congress, but the cloak of secrecy thrown around the Watergate affair, the ITT antitrust settlement, and the Russian wheat sale suggests the contrary. And the list of instances of executive withholding of information from Congress compiled for these hearings shows the President's assertion that executive privilege was used on only three occasions to be a gross understatement.

Traditionally, executive privilege disputes have been compromised and negotiated, so that no definitive limitations on the scope of this doctrine have evolved. The executive has on occasion taken the position that Congress cannot, under the Constitution, compel heads of departments by law to give up papers and information, regardless of the public interest, and the President is the judge of that interest. Members of Congress have replied, with substantial support from the academic community, that there is no executive privilege doctrine found in the Constitution, and thus that Congress is to be the sole judge of what information is to be given it.

I think it would be a mistake for either Congress or the executive to draw too indelible a line on the issue of executive privilege. I also



oppose inflexible legislation imposing automatic sanctions for wrongful or untimely invocation of the privilege. Congress already has subpoena and contempt powers. It can presently hold up nominations, cut off funds, or withhold authorizations. Until it has utilized, much less exhausted, its existing powers to require testimony or documents from the executive, it need not develop more powerful arsenals for enforcing its will.

Wherever the line is to be drawn, certain basic principles require recognition:

First, both practically and historically, executive privilege can apply only to the advice-giving process relating to decisions by the President himself. Communications among Government agency officials and even activities of Presidential aides outside their duties in behalf of the President cannot be drawn within the cloak of executive secrecy.

Second, the rights of Congress on behalf of the public and those of the public directly are not coequal. The special needs of Congress in fulfilling its legislative function under the Constitution, and its recognized role in overseeing execution of its laws by the Executive, require that it have access to information that otherwise might not be released to public view.

Finally, the executive should not be the sole judge of the scope of its own privilege, without check and without standards. To allow the executive to be its own arbiter on questions of disclosure is virtually to guarantee that the determination will be based on something less than the broadest view of the public interest. This is not acceptable to the Congress, or to the public.

To deprive Congress of information it requires is to destroy one of its most important functions. For, as the late Senator Norris said almost 50 years ago:

Whenever you take away from the legislative body of any country in the world the power of investigation, the power to look into the executive department and every other department of the government, you have taken a full step that will eventually lead into absolute monarchy and destroy any government such as ours.

I am pleased to have my Administrative Practice and Procedure Subcommittee join with two other Senate subcommittees in these hearings today. The Administrative Practice Subcommittee has been involved in the freedom-of-information field for over a decade, and I am looking forward to continuing this tradition and to bringing this important legislation up to date based on the inputs from these hearings.

Thank you.

Senator MUSKIE. Thank you, Senator Kennedy.

Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Executive privilege is a theory that has been elevated into a practice by the conduct of public officials in the course of two centuries of American politics.

The theory is that a President ought to have the opportunity to explore ideas and to test concepts with confidential advisers. No one seriously contests this right and this necessity.

The question arises when a President initiates a round of discussion which has a ripple effect throughout the executive branch.

How far are the conversations and actions immune from congressional inquiry and public scrutiny? As the ripples recede from the center at the White House, there must be some point at which they cease to be the confidences of Presidents and become the grist of government and of politics. At that point, the comity which accords the privilege should no longer operate to impede access to knowledge and information.

The determination of this point has resulted in the development of the practice that has been followed with some uncertainty in recent years.

It can be said, however, that there are some outside limits that are generally recognized. One of these, for example, is that executive privilege has never been extended to cloak actions that are the subject of criminal charges. I hope these hearings will assist in setting the boundaries in a more exact and helpful way.

Thank you, Mr. Chairman.

Senator MUSKIE. Thank you, Senator Mathias.

Senator ERVIN. I would like to mention that in the study made by the Subcommittee on Separation of Powers, this statement by Senator Mathias was a most valuable contribution.

Senator MUSKIE. Senator Chiles.

Senator CHILES. I am delighted to participate in these hearings. I think they come at a very hopeful time, and also at a time where Congress has a chance to do a better job because we are opening up our own system. I think when we are talking about the right of the public to know about what goes on in the executive branch and the right of Congress to know what goes on in the executive branch it is kind of hard to justify, when we close the door on all of our hearings and refuse the public the right to know what is going on in Congress.

I think we are making some progress in opening up Congress' doors and as we are setting our own house in order we are going to be prepared in doing a much better job in casting the mote out of the eye of the executive branch.

I think they do come at a time in which we are much better prepared to be able to work on these hearings.

Senator MUSKIE. Thank you very much, Senator Chiles.

Our first witness is not here, so we will turn to our second.

It is a pleasure to welcome this morning the Attorney General of the United States, Mr. Richard Kleindienst.

We appreciate your response to our invitation and we await your testimony.

**STATEMENT OF HON. RICHARD G. KLEINDIENST, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY PROF. ROBERT DIXON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE**

Mr. KLEINDIENST. Thank you, Mr. Chairman, Senator Ervin, members of these three very significant subcommittees.

I have Prof. Robert Dixon, who is Assistant Attorney General, Office of Legal Counsel of the Department of Justice, whom I might wish to confer with from time to time this morning if it is all right with Chairman Muskie and Chairman Ervin.



Senator ERVIN. I may have to go to the Judiciary Committee in a moment, but I would like to testify that the Attorney General has been most cooperative with the Senate committee in its present activities and I think he deserves praise for so doing.

Mr. KLEINDIENST. Thank you very much.

I have lost my cuff link.

Senator MUSKIE. It is right under your chair. I must say this is off-the-cuff. [Laughter.]

Mr. KLEINDIENST. This is the symbol of justice and it was given to me by the Delta Sorority. I treasure it, and I think it is appropriate that I wear it here this morning.

Mr. Chairman, I have a prepared statement which I would like to read, with your permission, and then I will be available to answer questions to the extent that I am able.

Chairmen Muskie and Ervin and gentlemen of these committees, I am pleased to appear before these committees to testify on S. 858, introduced by Senator Fulbright, and Senate Joint Resolution 72, introduced by Senator Ervin, both relating to separation of powers. Your joint letter of March 16, 1973, Messrs. Chairmen, indicates that these hearings are a continuation of the 1971 hearings on executive privilege held by the Subcommittee on Separation of Powers. I understand that, like the earlier hearings, these hearings will not be limited to proposed legislation, but will deal with the question of executive privilege as a whole. I hope these hearings will bring the executive and legislative branches together and make it possible to find some common ground in this very sensitive area, without infringing on the constitutional prerogatives of either.

# I

We deal here today not with a settled field of law but with an enduring constitutional value of the highest rank and necessity. Executive privilege is squarely founded in the separation-of-powers doctrine. The core principle of privilege, both congressional and executive, has been universally accepted, albeit the courts have not had occasion to delimit the outer boundaries. Separation of powers is an area where the legislative and executive branches may be forever destined to dispute the terrain with claims that often are legitimate and conflicting.

In the area of congressional-executive relations, students and practitioners often must find their guidance in historic precedents rather than in finding judicial decisions from courts of last resort. Such historic practices of one branch of our Government, especially when acceded to by another yield Burkeian rules of constitutional prescription of the highest vitality.

Continuation of these long-established practices and the mutual restraint which fostered their development is vitally important. As was said by Senator Fulbright in introducing S. 1125 in the 92d Congress, citing James Madison in the Federalist, "Neither the executive nor the legislature can pretend to an exclusive or superior right of settling the boundaries between their respective powers." 117 Cong. Rec. S2513 (daily ed. Mar. 5, 1971).

I shall discuss first the historic outlines of the doctrine of executive privilege as it has been understood and implemented by past Presidents and Congresses. My statement concludes with a brief discussion of the specific provisions of S. 858 and Senate Joint Resolution 72, I will, of course, be happy to respond to questions, as I indicated at the outset.

## II

The doctrine of executive privilege denotes the constitutional authority of the President in his discretion to withhold certain documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government, if he believes disclosure would impair the proper exercise of his constitutional functions. The authority of the President to withhold certain information from the coordinate branches of the Federal Government stems from the separation of powers doctrine embedded in the first three articles of the Constitution and implicit throughout the document. While not expressed in a constitutional clause, executive privilege necessarily flows from the powers vested in the President by article II. Similarly, the congressional power to use compulsory process in aid of its legislative functions is implied rather than expressed in article I.

The power to legislate implies the power to obtain information necessary for Congress to inform itself about the subject to be legislated, in order that the legislative function may be exercised effectively and intelligently. This authority is strongest against a private citizen, as illustrated by *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

The right of the executive to withhold information from Congress and the courts is equally well recognized. Executive privilege as applied to the compulsory process of the courts has been sustained by the U.S. Supreme Court in the case of *United States v. Reynolds*, 345 U.S. 1, 7-11 (1953). The Court's description of the extent of judicial review of the propriety of such a claim, cast in *Reynolds* in terms of the state secrets rule of evidence law, indicates that review is narrowly confined.

Executive privilege is replete with historic precedents supporting the doctrine, but has not yet been favored by extensive judicial review. There is no authoritative court decision on congressional power to compel production of documents or testimony on the part of members of the executive branch. The inevitable friction between the executive and legislative branches in this area usually has been moderated in a cooperative spirit, thus avoiding litigation.

It is important, in my opinion, to stress that virtually all congressional requests to the executive for information and testimony are freely complied with. There is a vast flow of documents, information and testimony from the executive to the Congress. As the President said in his March 12, 1973 statement on executive privilege, during the first 4 years of this administration. "hundreds of administration officials spent thousands of hours freely testifying before committees of the Congress." On at least one occasion in the current Congress the executive has complied on 12-hours' notice.

This problem of separation of powers arises only on those rare occasions when a committee of Congress believes that information or testimony is essential to the discharge of its legislative function



and the executive believes that furnishing that information or testimony would undermine the executive role.

The claim of the executive to withhold information from Congress dates from the administration of President Washington. In 1792, the House of Representatives investigated the conduct of the executive branch in connection with the ill-fated expedition of Major General St. Clair into the Northwest Territory.

Washington's cabinet concluded unanimously on April 2, 1792, that the House of Representatives could institute inquiries and call for papers generally and

that the executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public. Consequently were [sic] to exercise a discretion. The "Writings of Thomas Jefferson" (Ford ed., 1892) Vol. I, pp. 189-190.

President Washington determined that disclosure of the papers would not be contrary to the public interest and instructed the Secretary of War to make them available to the House of Representatives. The "Writings of George Washington" (GPO ed., 1939) volume 32, page 15.

In 1794, President Washington informed the Senate that he was withholding certain foreign relations papers in response to its resolution "which, in my judgment, for public considerations, ought not to be communicated." Senate executive journal (1789-1805) 147; Richardson, "Messages and Papers of the Presidents" (GPO ed., 1896) volume I, page 152. In 1796, in connection with the appropriation of funds to carry out the financial provisions of the Jay Treaty, the House of Representatives requested the President to produce the instructions to the negotiating minister, and the correspondence and other documents relating to the treaty. President Washington in this instance advised the House that he could not comply with its request. He explained:

as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request. Richardson. Messages and Papers of the Presidents (GPO ed. 1896) Vol. I, pp. 194-196.

Recognizing the significance of this decision, the House debated the issue at length. See 5 Annals of Congress 426-783 *seriatim*. James Madison's speech during that debate is significant:

He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations. . . . He was as ready to admit that the Executive had a right, under due responsibility, also, to withhold information, when of a nature that did not permit a disclosure at the time. . . .

If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department. 5 Annals of Congress 773 (1796).

### III

Since this beginning in the 1790's, virtually every President has had occasion to determine whether the disclosure of certain information to Congress is appropriate. The primary areas of nondisclosure have been foreign relations, military affairs, pending law enforce-

ment investigations, and intragovernmental discussions. The Presidential position has been that the executive had a constitutional power to refuse information to Congress. See generally "Younger, Congressional Investigations and Executive Secrecy: A study in the Separation of Powers," 20 U. Pitt. L. Rev. 755 (1959).

The need for secrecy in the first two categories, foreign relations and military affairs, is recognized by the judicial branch. See, e.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936); *United States v. Reynolds*, 345 U.S. 1 (1953); *New York Times v. United States*, 403 U.S. 713, 728 (1971) [Mr. Justice Stewart concurring].

Congressional recognition of executive power to withhold information in the field of foreign relations may be found in the time-honored formula of resolutions of inquiry directed to the Department of State in matters of foreign relations. The Secretary is requested to furnish the information "if not incompatible with the public interest." See Cannon's Procedure in the House of Representatives, H. Doc. 610, 87th Cong., 2d Sess., page 219; *Curtiss-Wright*, supra, at 321. It has been conceded that the executive would have the same non-disclosure power if the precautionary clause were missing. 40 Cong. Rec. 22 [1905] [Remarks of Senator Teller].

It has also been acknowledged in Congress that the President's authority to withhold extends to military information which could be of use to an enemy. See, e.g., Senator Spooner's remarks, 41 Congressional Record 97-98 (1906). More recently, in connection with the U-2 incident, the Senate Foreign Relations Committee recognized that with respect to foreign intelligence operations:

The administration has the legal right to refuse the information under the doctrine of executive privilege. S. Rept. 1761, 86th Cong., 2d Sess., p. 22.

Congress likewise has recognized the validity of claims of executive privilege for internal advice to the President. The privilege has been invoked to promote frank advice within the executive branch and preserve confidentiality regarding conversations with the President.

For example, during the investigation of the dismissal of General MacArthur in 1951, General Bradley refused to testify about a conversation with President Truman in which he had acted as the President's confidential advisor. The late Senator Russell, the committee chairman, recognized that claim of privilege, and his ruling was upheld by the committee. [Military Situation in the Far East, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, U.S. Senate, 82d Cong., 1st Sess., pp. 763, 832-872.]

The existence of the privilege below the level of communications with the President was recognized in a Senate investigation conducted in 1962, into military cold war education and speech review policies. President Kennedy, by letters dated February 8 and 9, 1962, directed the Secretaries of Defense and State not to disclose the name of the individual who had reviewed any particular speech. He explained:

It would not be possible for you to maintain an orderly Department and receive the candid advice and loyal respect of your subordinates if they, instead of you and your senior associates, are to be individually answerable to the Congress as well as to you, for their internal acts and advice. [Reprinted in Military Cold War Education and Speech Review Policies, Hearings before the Special Preparedness Subcommittee of the Committee on Armed Services, United States Senate, 87th Cong., 2d Sess., pp. 508, 725.]



The chairman of the subcommittee, Senator Stennis, upheld the claim of privilege, stating in part:

We now come face to face and are in direct conflict with the established doctrine of separation of the powers. . . .

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the legislative branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field. [Id. at 512.]

Finally the executive branch has repeatedly withheld from Congress what may be referred to generally as “investigative files.” The leading precedent in this area is Attorney General Jackson’s refusal in 1941 to comply with the request of Chairman Carl Vinson of the House Naval Affairs Committee for certain investigative reports of the Federal Bureau of Investigation. See 40 Op. A.G. 45.

The Attorney General refused because disclosure of FBI information could substantially prejudice law enforcement, by allowing a prospective defendant to know how much or how little information the Government had about him, and what witnesses or sources of information it was proposing to rely upon. His opinion also cited the serious prejudice to the future usefulness of the Government’s investigative agencies, since much of the information was (and is) given in confidence and can only be obtained upon a pledge not to disclose the source.

Finally, Attorney General Jackson said that disclosure “might also be the grossest kind of injustice to individuals,” since the reports included:

Leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation. [40 Op. A.G. at 47.]

The claim of privilege in these four traditional categories of foreign relations, military affairs, investigative reports, and internal advice is well supported by reason and precedent. The need for secrecy in the conduct of foreign relations is demonstrated by the recent Vietnam peace negotiations. The necessity for absolute secrecy concerning weapons systems, and tactical military plans during hostilities, is self-evident. The need for confidentiality of investigative reports, cogently articulated by Attorney General Jackson as noted earlier, has been reaffirmed by the experience of recent weeks.

In the area of Executive decisionmaking, the President must be able to receive absolutely candid, impartial, and disinterested advice from his advisers. Presidential advisers may hedge their opinions, or even remain silent, if they know that their advice may soon be examined out of context by Congress, the press, and the public, or that the President may have to explain why he did not follow it. As the President said in his March 12, 1973, statement:

[W]hat is at stake . . . is not simply a question of confidentiality but the integrity of the decisionmaking process at the very highest levels of our Government.

#### IV

The principle of executive privilege has been applied by past Presidents not only to furnishing documentary information, but to appear-

ance of the President's immediate assistants as witnesses before committees of Congress. Requests for their appearance have rarely been made, and still more rarely pressed. Past Presidents who have addressed themselves to such requests appear uniformly to have considered the appearance of such advisers to be solely a matter of Presidential discretion, i.e., it is a right which may be asserted or waived by the President.

On two occasions during the administration of President Truman a subcommittee of the House Committee on Education and Labor issued subpoenas to John R. Steelman, who held the title of "assistant to the President." He returned both subpoenas with a letter stating that the President had in each instance directed him, in view of his duties as a Presidential assistant, not to appear before the subcommittee. [Investigation of the GSI Strike, hearings before a special subcommittee of the Committee on Education and Labor, House of Representatives, 80th Cong., 2d Sess., pp. 347-353.]

In 1951, Donald Dawson, an administrative assistant to President Truman, was requested to testify before a Senate subcommittee investigating the Reconstruction Finance Corporation, one aspect of which concerned Mr. Dawson's alleged misfeasance. The President affirmed his belief that this request constituted a violation of the constitutional principle of the separation of powers, but "reluctantly" exercised his discretion to permit Mr. Dawson to appear and testify to clear his name. [Study of the Reconstruction Finance Corporation, hearings before a subcommittee of the Committee on Banking and Currency, U.S. Senate, 82d Cong., 1st Sess., pp. 1709, 1795, 1810. See also New York Times, May 5, 1951, p. 75; May 11, 1951, pp. 1, 26; May 12, 1951, pp. 1, 12.]

In 1944 Jonathan Daniels, an administrative assistant to President Roosevelt, refused to respond to a subcommittee subpoena requiring him to testify concerning his alleged attempts to force the resignation of the Rural Electrification Administrator. He based his refusal on the confidential nature of his relationship to the President. The subcommittee recommended that Daniels be cited for contempt. Thereafter he wrote the subcommittee affirming that he was not subject to subpoena, but advising it that the President had decided to waive the privilege in that instance. [Administration of the Rural Electrification Act, hearings before a subcommittee of the Committee on Agriculture and Forestry, U.S. Senate, 78th Cong., 1st Sess., pp. 615-629, 695-740.]

During the Eisenhower administration Sherman Adams declined to testify before a committee investigating the Dixon-Yates contract because of his confidential relationship to the President. However, at a later date in the administration he was permitted to appear and testify concerning his dealings with Bernard Goldfine. [Investigation of Regulatory Commissions and Agencies, hearings before a subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 2d Sess., pp. 3711-3740.]

During the hearings on the nomination of Justice Fortas as Chief Justice, the Senate Judiciary Committee requested W. DeVier Pierson, then Associate Special Counsel to President Johnson, to appear and testify regarding the participation of Justice Fortas in the drafting of certain legislation. Mr. Pierson declined to appear, and wrote the committee as follows:



As Associate Special Counsel to the President since March of 1967, I have been one of the immediate staff assistants provided to the President by law. (3 U.S.C. 105, 106.) It has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President. This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore respectfully decline the invitation to testify in the hearings. [Nominations of Abe Fortas and Homer Thornberry, hearings before the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., pp. 1347, 1348.]

Like the historically far more frequent refusals to supply documents and information, these refusals by Presidents to permit their immediate advisers to appear before congressional committees are well grounded in principle. As the President himself said in his March 12 statement:

Under the doctrine of separation of powers, the manner in which the President personally exercises his assigned executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency.

If another branch of Government could compel the attendance of the President, for the purpose of inquiring into the performance of his official duties, it would seriously impair the independence of the Presidency and the executive branch. After leaving office President Truman recognized that danger in a radio address on the occasion of his refusal to appear pursuant to a subpoena before the House Un-American Activities Committee. He stated that if a President or former President could thus be called and questioned about his official duties, "the office of President would be dominated by the Congress and the Presidency might become a mere appendage of Congress." *New York Times*, November 17, 1953, page 26. The same inroad on separation of powers and independence of the Presidency would result if an immediate staff assistant to the President could be called before a committee for the avowed or apparent purpose of questioning him about his duties on behalf of the President.

In 1971, testifying at the earlier session of these hearings, the late Dean Acheson graphically illustrated the objections to an unlimited congressional power to call these assistants:

With what relish one can imagine Senator Joseph McCarthy conducting these examinations without judge or defending counsel. Television would, of course, occupy half of the hearing room; the press the other half. The employee's duties, relations with the President, with other employees in the White House, the State Department, and representatives of foreign governments, his qualifications for his duties, past experience, social life, and friends would all receive attention. He would be asked about matters he had worked on, although not the substance of them, aside from the one on which he was summoned and long arguments would be provoked about whether the President's letter provided exemption from answering extraneous questions irrelevant to its principal subject.

As summons might follow summons as fast as committee clerks could get them out with the aid of the Congressional Directory and these witnesses followed one another with letters asserting privilege, what a picture could be created of a President in the center of a web of secret machination. What a picture presented to the world of a government as bizzarre, absurd, and divided by tragic vendettas as the King of Morocco's birthday party.

In short, what a hell of a way to run a railroad! [Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 92d Cong., 1st Sess. on S. 1125, pp. 260-61.]

I shall now discuss briefly and in general terms the two bills, S. 858 and S.J. Res. 72, which seek to regulate and restrict the exercise of executive privilege. The Department of Justice has been requested by the Senate Committee on Government Operations to comment on S. 858 and will submit the usual detailed report on it in the near future.

Because of the constitutional principles and historic practices just discussed, it will come as no surprise to you that the Department of Justice is opposed to many aspects of the proposed legislation. It would serve no valid purpose for a Government official to appear before a committee only in order to submit, in the words of S. 858, "a statement personally signed by the President requiring that the employee assert executive privilege as to the testimony or document sought."

In keeping with the coequal status of the executive and the Congress, a written communication invoking privilege should suffice in those instances where it applies to the very appearance of the witness, to all of the envisaged testimony, or all of the requested documents.

Hypothesize the reverse situation where a court or an executive agency subpoenas a Senator to testify or to produce documents in the custody of the Senate, and the Senate decrees to the contrary. See Senate rules V(1) and XXX. The Senate doubtless would resist if the court or agency nevertheless should insist that the Senator appear personally merely to present the Senate resolution.

When the Senate limited the scope of the response of a Senator and of senatorial employees to a judicial subpoena, Senator McClellan pointed out:

The Senate recognizes it has certain privileges as a separate and distinct branch of the Government which it wishes to protect. [108 Cong. Rec. 3627 (1962).]

We also have serious difficulties with that aspect of the proposed legislation which would purport to make it a question of fact for the committee to decide whether an assertion of privilege is well taken. We deal here, as often in the constitutional field, with a fact/law interface, and not with a simple question of fact.

However, the statement made by Senator Fulbright in introducing the bill—119 Cong. Rec.;—Daily Ed., February 15, 1973, S. 2527—suggests that the "question of fact" clause may have been designed to enable the committee simply to substitute its judgment for that of the President regarding executive privilege. If this is the import of the clause it obviously would raise fundamental constitutional problems. The clause would point toward congressional supremacy inconsistent with the separation-of-powers system and doctrine.

## VI

To conclude, executive privilege is a constitutionally founded, historically accepted, and vital principle of American Government. At the same time we recognize that this separation-of-powers prerogative should be exercised in restrained fashion in order not to needlessly bar the flow of information relevant to legislation. Indeed, this administration has adopted and honored stringent guidelines to prevent such



occurrences—and will continue that policy. Insofar as the current executive-legislative relationship takes on a sharper edge because of Watergate, it must be borne in mind that determination of alleged violation of the criminal laws passed by Congress is uniquely the province of the Judiciary. For crime there can be no haven, and the White House has stated that even the President's close personal aides will respond to grand jury inquiry.

When all is said and done, this separation-of-powers frontier, like the concept of justiciability under article III of the Constitution, will forever elude neat definition. Paraphrasing what Justice Jackson once said about justiciability, we can say in regard to executive privilege that "when all of the axioms have been exhausted and all words of definition have been spent, the propriety of invoking executive privilege in a particular instance "will depend upon a circumspect sense of its fitness informed by the teachings and experience" of the past. [*Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243, (1952).] We are striving to show such a "circumspect sense of fitness" regarding the ongoing vitality of the basic constitutional principle of separation of powers, and we invite your cooperation.

Thank you, Mr. Chairman.

Senator MUSKIE. Thank you, Mr. Attorney General.

I note that we have several Senators present, and if there is no objection we will use the 10-minute guide for questions so that everyone will have a fair shake in questions. So I will undertake to use that much time to get into the subject.

In your testimony, Mr. Attorney General, you made a statement to this effect:

Such historic practices of one branch of our government, especially when acceded to by another, yield Burkeian rules of constitutional prescription of the highest vitality.

Are you saying what is not constitutional in the first instance can be made constitutional by the repetition of continued practices?

Mr. KLEINDIENST. No; what I say is that in this very vital, this very intricate field the proper determination and relationship between the parties is indeed established by the Constitution. That is the only document we have by which we can guide ourselves.

I think many have formed opinions about the Constitution since. Many have attempted to do things with respect to its sense that find no warrant in that document itself. This is the highest constitutional question that I can think of.

Senator MUSKIE. In *McGrain v. Daugherty*, which has been referred to this morning and I think the case has been put in the record by Senator Ervin, the court said that the

Investigatory power of the Congress was regarded as an attribute of the power of the legislature in the British Parliament, and the constitutional provisions which permit the legislative functions to the two Houses are intended to include this Act.

Is there any precedent in the legislative powers of parliament for this doctrine of executive privilege which you have asserted this morning?

Mr. KLEINDIENST. I would think that it might be helpful in some limited respect to take a look at parliamentary procedures that existed before the adoption of our Constitution. However, the founders of our Government and of our Constitution were very careful not to adopt in

our Government certain things that had been going on in the parliamentary government in England.

I would like to point out the case to which you refer involved a private citizen. It did not raise the doctrine of separation of powers. I think it is significant that that case and a few others have pointed out that the Constitution itself did not give the Congress the express power to issue subpoenas, to conduct investigations, but said that that was an implied power given by the Constitution to the Congress to fulfill its objective. But it would not provide any fruitful basis for me to look at the parliamentary government in England before the adoption of our Constitution or since to touch on this very, very basic question.

England does not have a constitution. The government of that country is not circumscribed by the pages of that document as ours is.

Senator MUSKIE. Mr. Attorney General, by my question I don't intend to include too much, but you in your statement made clear what we all know. There has been no judicial decision establishing executive privilege.

Mr. KLEINDIENST. That is right.

Senator MUSKIE. The phrase is not found in the Constitution of the United States. So we need to undertake to determine under all the precedents, including those upon which the Founders relied to establish the Constitution in the first instance, the basis for this claimed privilege. *McGrain v. Daugherty* declared that the investigative power was regarded as an attribute of the power to legislate in the British Parliament. If it was regarded by the founders and if there was ample evidence that they understood what the attributes of the British power and Parliament was, it was probably a reason why they weren't explicit about it.

Let me turn to something they were explicit about.

Only one department of the Federal establishment, and that is the Congress, was given any authority at all with respect to secrecy of information, and this was explicit. The Founders authorized secrecy in only one case, and then by Congress and not the President. Congress is required to keep and publish journals except such part as may in their, each House's judgment, require secrecy.

Now, it is just as legitimate to argue, is it not, Mr. Attorney General, if the founders intended the executive to practice secrecy it would have been as explicit. May I say that the debates in the convention indicated even in the hands of the Congress that was intended to be limited.

Mr. KLEINDIENST. I don't like your reference to the English parliamentary system as an answer to this situation.

Senator MUSKIE. Well, the court did and so I do.

Mr. KLEINDIENST. In the parliamentary system, the executive, the prime minister, comes out of the legislature. Our founding—

Senator MUSKIE. Not the King, Mr. Attorney General. These powers of the Parliament were developed for the purpose of checking the arbitrary powers of an absolute monarch, and that is what they sought to avoid in the office of the President.

Mr. KLEINDIENST. That is what we sought to do. The checks and balances imposed by the Congress on the President of the United States, whether exercised or not, are enormous, and they flowed from that desire to get away from the power of the King. But the present parlia-



mentary system where they have no King except for ceremonial and customary purposes, I am saying the executive, the Prime Minister, is part of the legislature.

Senator MUSKIE. Are you saying, Mr. Attorney General, that notwithstanding the statement by the court, that the attributes of parliamentary power under the British system are irrelevant to the subject we are inquiring into?

Mr. KLEINDIENST. They are not irrelevant except as they are distinguished and limited by a document called the Constitution of the United States. The Constitution itself governs our free people and civilization.

Senator MUSKIE. Will you tell me where did the phrase "executive privilege" arise? When did it first come into the language?

Mr. KLEINDIENST. I really don't know, but I think that the parent concept of a separation of powers——

Senator MUSKIE. I want to concentrate on the phrase. When did it come into the language?

Mr. KLEINDIENST. I really don't know, Senator. It is immaterial to me.

Senator MUSKIE. Well, it is not immaterial to me.

Mr. KLEINDIENST. It would be one means by which a President would honor and effectuate the concept of the separation of powers envisioned by our Constitution.

Senator MUSKIE. Mr. Attorney General, I am trying in my own inadequate way to get back to the precedents we are all exploring for the purpose of defining this very undefined and very important issue. I think it is helpful as we go back into our history. You will have to pardon me if I pursue my own line of inquiry. It may be meaningless to you, but I don't think it is meaningless, in fact, to ascertain when the phrase came into the language, because it is now asserted, the phrase is asserted over and over again as though it existed somewhere in our fundamental documents. I think an inquiry would indicate that is not so, and I am simply trying to make that a matter of record.

Mr. KLEINDIENST. I thought you were asking me a question. I didn't realize you were making a statement for the record.

Senator MUSKIE. No, I am asking a question based upon that statement. Do you know approximately when the phrase came into the language?

Mr. KLEINDIENST. No, I do not.

Senator MUSKIE. Does your adviser know?

Mr. KLEINDIENST. Do you know?

Mr. DIXON. We are dealing with semantics here.

Mr. KLEINDIENST. We are talking about words.

Senator MUSKIE. We are not talking about words. We are talking about something this administration asserts over and over again.

Mr. KLEINDIENST. President Washington, as an executive, invoked privilege, as I indicated in my former remarks——

Senator MUSKIE. He did not use the words "executive privilege."

Mr. KLEINDIENST. To the separation of powers doctrine.

Senator MUSKIE. To get into the subject of President Washington, I would like to focus on my question. Neither you nor your adviser know when the phrase came into the language?



Mr. KLEINDIENST. I don't know, no. I know when such acts were committed by many presidents——

Senator MUSKIE. I know those, too, and I will get into those in my own way as you have in yours.

Mr. KLEINDIENST. But I don't know the answer to your question.

Senator MUSKIE. I suggest they arose at the time of the Eisenhower administration.

Mr. KLEINDIENST. We don't know the answer to that question, Senator.

Senator MUSKIE. Is the phrase found in the Constitution?

Mr. KLEINDIENST. I don't believe so, nor is the investigatory power of Congress. The doctrine of separation of powers is all over the Constitution.

Senator MUSKIE. Would you focus on my question. I am limited to 10 minutes and I would like to proceed from one point to the next as fast as I can. I am not trying to belabor you. An insignificant question turns into an important one, apparently.

The next question I would like to get into: in your statement you quoted from a statement written by Mr. DeVier Pierson in which he said that:

Members of the President's immediate staff shall not appear before a congressional committee to testify with respect to the performance of their duties on behalf of the President.

Is that an accurate and complete definition of their privilege, in your view?

Mr. KLEINDIENST. No, I don't think so. I assume when Mr. Pierson wrote that he was doing so at the direction of the President of the United States. I do not believe that Mr. Pierson, myself, or anybody else who was employed by the President of the United States has the power to invoke this privilege. I believe it can be done only by the President.

Senator MUSKIE. I am only asking whether that statement, whatever Mr. Pierson's authority, whether that statement represents in your view an accurate definition of the executive privilege rights or whatever phrase you choose to apply to their rights of the President's immediate staff?

Mr. KLEINDIENST. It touches on part of it. I don't think it fully states it, nor do I think it pretends to——

Senator MUSKIE. What else is there to it? You mean they have such rights with respect to actions taken by them outside the performance of their duties?

Mr. KLEINDIENST. In my opinion, Senator Muskies, if the President of the United States should direct me or any other person on his staff not to appear before a congressional committee to testify or to bring documents, that he has the constitutional power to do so and that person should not do it.

Senator MUSKIE. Whatever the subject?

Mr. KLEINDIENST. Yes, sir.

Senator MUSKIE. A crime?

Mr. KLEINDIENST. Yes, sir, more particularly an alleged crime, because with respect to that, in order to safeguard the constitutional rights of putative defendants, we have a judicial system, a grand jury system by which crimes are investigated to determine guilt or innocence and at the same time afford full constitutional protection.

Senator MUSKIE. You have raised two questions, both of which are worth pursuing.

You say that if a member of the President's staff is alleged to have been guilty of committing a crime, whether or not in connection with the performance of duties to the President, that executive privilege can be invoked to protect him from testifying before a congressional committee?

Mr. KLEINDIENST. If the President of the United States directed a person on his staff, who was accused of a crime, not to appear before a Senate committee with respect to an examination of that criminal conduct, that person, in my opinion, should not appear and could not appear. The proper forum with respect to the inquiry into criminal conduct is the judicial system and the grand jury system.

Senator MUSKIE. The answer to my question is "No"?

Mr. KLEINDIENST. The answer to your question is "No", yes, sir.

Senator MUSKIE. Now, with respect to the separation of powers, what are the three departments of government?

Mr. KLEINDIENST. Well, my understanding of it is the Congress of the United States, the judiciary, and the executive branch.

Senator MUSKIE. So the right of executive privilege, as you interpret it, gives you the right or the President the right to deny information to the legislative branch but not to the judicial branch?

Mr. KLEINDIENST. Well, that is an academic question.

Let me comment on that, Senator Muskie, if I may, and then I may direct myself to your piercing inquiry.

Senator MUSKIE. It is not piercing. I am up against a rather unusual—

Mr. KLEINDIENST. No President, to our knowledge, has ever prohibited any person on his staff from appearing before a judicial proceeding that, subject to our Constitution with its safeguards, looks into criminal conduct. The Supreme Court said once that a President of the United States, himself, was not amenable to process by the judiciary. In other words, the courts could not look into a President's criminal conduct and that was with respect to enforcement of reconstruction legislation and alleged criminal neglect by President Andrew Johnson which subsequently resulted in an unsuccessful impeachment proceeding. President Nixon has said, and as all other Presidents have said prior to him, that if there is alleged criminal conduct or neglect by people on his staff they should be amenable and available to the grand jury system or judiciary. It is really academic up to now.

Senator MUSKIE. We will get back to my question. As I think you are quite familiar, the Congress does, in connection with its investigative activities, often get into extensive investigations relating to crime, alleged crime for the purposes of developing legislative interests with regard to your department, the Department of Justice.

If in connection with those inquiries the extent of which I assume you would agree is to be determined by the Congress. Congress comes to believe members of the President's staff have knowledge relating to the commission of crime, whether or not they themselves are the persons involved: is it your view that in connection with that legitimate process that the doctrine of executive privilege as you have defined it would make it possible for the President to withhold their testimony from the Congress?

Mr. KLEINDIENST. That is my opinion, Senator Muskie.



Senator MUSKIE. And you perceive of no circumstance under which members of the President's staff can be required to testify before committees of Congress with respect to alleged crimes, crimes in which they are alleged to be involved, whether or not the alleged crimes in any way involved the prerogatives of the Congress, the violation of laws, you can see where there is no circumstance, is that it?

Mr. KLEINDIENST. No, I can't. We have a criminal justice system. We have a judicial system. We have constitutional rights to protect people accused of crimes. That is the better forum, but I don't think that the fact that the inquiry would be one of crime as compared with policymaking or other high responsibilities of the President——

Senator MUSKIE. I think you have amply defined your position, and I have exceeded my time and I call on Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Mr. Attorney General, in your testimony you make the statement that "executive privilege is replete with historic precedents supporting the doctrine," but you wouldn't attempt to invoke the rule of *stare decisis* on this question, would you?

Mr. KLEINDIENST. It would be pretty difficult to invoke it, Senator Mathias, because there is very little judicial literature in the field, and I think for a very good reason.

Senator MATHIAS. You don't think we are bound by what has been done in the past. It may be helpful. It may be a guideline. It may be influential.

Mr. KLEINDIENST. We are bound in this respect, Senator Mathias. As we are called upon to discharge our duties in the executive branch of the government one of our responsibilities is to form opinions with respect to what the Constitution means. I think one of the reasons for the dearth of literature by the judiciary in this field is that the question has been generally regarded as being committed to the executive. The Constitution meant what it said when it separated the three branches of the government and thereby provided that one couldn't intrude upon the other. So, I think that history of precedent of 200 years is, in fact, our *stare decisis* here.

It is a potential matter as it has always been. It is a matter of policy for the electorate. If they believe the President should do these things when he runs for the Office of President of the United States and he runs his campaign and says if I am President I will do such and such as proposed, the electorate can pass upon that. To require otherwise would be an abnegation of the sacred doctrine of separation of powers in our government.

Senator MATHIAS. But isn't that particular appeal the very thing that the Constitution is all about, that we established some rules by which we are to govern our conduct, abiding rules that do not fluctuate with every emotional tide in the country. If you appeal to the mandate of the last election on a technical question of this sort, aren't you undercutting the most fundamental concepts of the Constitution?

Mr. KLEINDIENST. I think you are now talking about policy rather than the constitutional delineation of powers. That is why the doctrine is so seldom invoked. That is why the executive, particularly in times like we are living in—as I indicated in my formal remarks—literally floods the Congress with information and testimony. I spend a great part of my time, Senator, as you know, appearing before various



committees of the Congress of the United States. So it is the exception that we are talking about. No one would want a President of the United States to be an instrument of Congress. No one would want the Congress to impeach the President, then the Vice President and have the Speaker become the President, then impeach the Justices of the Supreme Court and have that congressional President appoint his own Justices. Nobody ever suggested that. Nobody ever suggested that would occur.

Likewise, our Founding Fathers always wanted to have a free and independent President who is amenable to the general electorate, and if we don't like his policies and the way he runs his government, they can determine that at the next election.

Senator MATHIAS. It seems to me it is important to know if what was done was the right thing under the circumstances, in the precedents that you have cited.

Mr. KLEINDIENST. If we don't like what they wrote in the Constitution then it can be changed by amendment but not by legislative act.

Senator MATHIAS. If we are talking about some of the precedents that have been cited here this morning, for instance, you say on page 10 the case of General Bradley who claimed the privilege because he had been a confidential adviser to President Truman.

Would you feel that that was a case where he should have been granted immunity?

Mr. KLEINDIENST. Well, Senator, I would like to answer it this way, if I may. Based upon my notion of the doctrine of the separation of powers, this is a power relegated to the President of the United States alone. What one President might do as compared to another to me is immaterial to the inquiry. Whether I would have done that, whether you would have done that at that time if you were President is strictly up to you as a President of the United States. In most instances they permit people to testify. In most instances officials of the executive branch go up there and tell them what they want to know. In this case I determine as President of the United States that I don't want you to do it. You might argue politically, policywise, but so far as I am concerned that ends the matter.

Senator MATHIAS. It does seem to me we have to be guided by the experience of the past. But if precedents are going to have any binding effect on us we have to have some confidence that the precedents are correct. The cases you cite in your testimony, of President Kennedy and of Attorney General Jackson, are two other examples.

Frankly, I think I would have supported, had I been in Congress at the time, the immunity of General Bradley.

Mr. KLEINDIENST. Senator Russell, I think, acknowledged the exercise as proper.

Senator MATHIAS. It seems to me that is the classic case of a confidential adviser who is entitled to some immunity for the protection of the President. But would you have any view on the other two cases, the case of President Kennedy directing that the Secretaries of Defense and State not disclose the names of individuals who had reviewed his cold war speech?

Mr. KLEINDIENST. Certainly, this is a little bit more delicate area of the doctrine, but it is also one of the most important areas. A President can only act or can best act by people, people on his staff, people

who do things, people who talk to other people, people who are an extension of the Presidency. I think those are the words, if I am not mistaken, President Kennedy used. If anything is done to inhibit or limit or restrain people from acting on behalf of a President and an erosion in that area should come about, we would soon, I think, find ourselves in a situation where we would have a country without leadership, without executive leadership, and that is what this whole problem is all about, it seems to me.

Senator MATHIAS. I find the case where Attorney General Jackson refused to comply with the request of Carl Vinson for certain investigative reports more dubious. That gets further from the center of power and further away from the immunity which I think is the central argument that you make.

Mr. KLEINDIENST. Senator Kennedy interrogated me at length with respect to that a year ago at my confirmation hearings. I have always refused to make available investigative reports. I think the only exception I have entertained is in connection with this Watergate matter. I have denied access to investigative reports more on policy grounds, although if pushed I would do it on the basis of separation of powers for two reasons: first, you have a desire to protect innocent people from disclosure of this raw data; second, the investigative process depends pretty much on the fact that it is confidential. When people talk to an FBI agent the information obtained is to be held confidential and if it weren't they wouldn't cooperate and we wouldn't be able to investigate crimes effectively. But if pushed to it where a situation came up where I would be held in contempt and Senator Kennedy would put me in jail, I think at that point I would call up the President and ask if I could invoke executive powers and privilege, and if he said yes, I would so state and then we would have the groundwork for a technical determination of the point.

I am grateful I was never pushed to that point.

Senator MATHIAS. It seems to me—we will be—my time is up—we will get into that shaky area.

Mr. KLEINDIENST. I don't think it is shaky.

Senator MATHIAS. You get into the area, in your testimony, where you talk about Truman and Dawson and Daniels. It seems to me where they got to the edge of that and entered a plea of *nolo contendere*. They say they have this immunity. But you and I have both been lawyers and tried cases, and you know you stand up and say yes, my client is right but we will compromise and that is about what they did.

Mr. KLEINDIENST. No, I don't think so. You are getting to the policy of the President of the United States. He could direct the Presidential aide not to go before a committee. But he may decide that for a particular purpose, the aide may go ahead and testify.

Senator MATHIAS. One of the reasons is the case isn't very strong when you get to that point.

Mr. KLEINDIENST. No, that is not the case with respect to the separation of powers, but the case with respect to the actual facts and its relationship with the public and the desire of the President for his own reasons, political or otherwise. The privilege is that of the President. But the decision not to invoke the privilege for particular purposes doesn't at all inhibit or detract from or diminish that basic doctrine of separation of powers that we are talking about.



Senator MATHIAS. I am not going to return to the strength of the precedents restraining our own inquiry at this time, but I make this observation that I was at the judicial conference for the District of Columbia yesterday, and a very prominent jurist addressed the conference while I was there and he made the observation, let me say in a totally different context, that what was good enough in the time of President Polk and Chief Justice Chase may not necessarily be good enough today. I think that that has some relation to this citing of precedents in this matter.

Senator MUSKIE. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

So that I can understand somewhat more clearly, Mr. Kleindienst, your response and explanation to Senator Mathias, do I understand you to say that you are going to be the final arbiter as to what material will be made available to the Congress under these rather general outlines that you have given?

Mr. KLEINDIENST. Within the scope of my responsibilities as Attorney General and with respect to the investigative reports of the FBI, I think I would say I would be the arbiter on that.

Senator KENNEDY. So when you make a decision yourself and you say to the Congress, as you said to the Judiciary Committee and Senator Ervin and me when we were interested in obtaining manuals of the FBI and other information, you said that you are not going to supply it, are you, then, exercising executive privilege or not?

Mr. KLEINDIENST. Senator, I do not know if at that time I said I would not supply manuals. I think you asked me whether or not I would rely upon executive privilege and I said I would not, that it was a question of policy, that we never pursued it further. The only way I could have exercised executive privilege would have been to discuss it with the President and have him exercise it.

Senator KENNEDY. This is the point we are trying to find out. I would refer you to the exchange in the hearings, page 64 of the Judiciary Committee hearings where we requested the various manuals, it sounds to me like these are general guidelines, does it not, to you? It says investigations were to be conducted in accordance with the manual of instructions. Let me quote from our exchange:

Mr. KLEINDIENST. I would not want to speculate about it until I have seen it.

Senator KENNEDY. We will hear back from you on it?

Mr. KLEINDIENST. I will come back and give you an answer whether it is an opinion, if that document is one we should give to the Senate.

What is the basis for your saying that you will decide whether you will give us this information? Have you been delegated to exercise executive privilege?

Mr. KLEINDIENST. No, sir, I would never—

Senator KENNEDY. Has there been such a delegation?

Mr. KLEINDIENST [continuing]. Invoke or attempt to use executive privilege without express direction of the President of the United States. And I think that is what I said in our dialogue. I do not know whether I ever looked into that question and came back with a report to you or whether you would have pressed me on it—you were pressing me on an awful lot of things at that time—but I think I made it clear that my delineation was based upon policy and that policy was in my opinion, what was best to effectuate the important task of the FBI to

investigate crimes and to do it in a manner to protect innocent people and also bring people to justice.

Senator KENNEDY. Even if it was a manual of procedure?

Mr. KLEINDIENST. If I look at a manual of procedure and it would have no impact upon that function I would be very happy to give it to the Senate. If, on the other hand, it is an internal document, the disclosure of which would interfere with, prejudice, or make it difficult for the FBI to perform the task that the Congress has provided they perform, I would form that judgment. Then if you press it further, Senator Kennedy, and demanded it, I think I would then determine whether or not the President wanted to invoke the doctrine of separation of powers. If he then invoked it then it would be very, very difficult for you to get that document from me, impossible.

Senator KENNEDY. Is this a game where we are supposed to guess as we move along first, as to what is your particular view about these various documents and then, whether your decision will stand depending upon how hard we press?

Mr. KLEINDIENST. No.

Senator KENNEDY. What is it, then?

Mr. KLEINDIENST. I am available to this Congress at all times. The denial of access to investigative reports has been a matter of precedent and practice for 50 years.

Senator KENNEDY. Does it make a difference?

Mr. KLEINDIENST. On the Watergate situation, we worked out a procedure with Senator Ervin and Senator Baker and Senator Eastland and Senator Hruska so that the Senators and their counsel could have complete, unrestricted access to the files of the FBI to aid in their investigation. I think I am the first Attorney General in 50 years who has ever done that.

Senator KENNEDY. To certain Senators. And you were part of an agreement to let staff members view materials but not all representatives.

Mr. KLEINDIENST. That is right. That was part of the agreement I worked out with Senator Ervin and Senator Baker, yes, sir.

Senator KENNEDY. This was not the particular committee that had the question of jurisdiction over considering the nominee for the FBI?

Mr. KLEINDIENST. No.

Senator KENNEDY. The grievances—

Mr. KLEINDIENST. Senator Eastland and Senator Hruska were informed that I would apply the same procedure to the subsequent Judiciary Committee proceeding and they both acceded to that.

Senator KENNEDY. Does it make a difference whether an individual member asks for material or whether a committee or subcommittee asks for the material?

Mr. KLEINDIENST. My feeling is that the raw investigative data—

Senator KENNEDY. I am not asking that question. I am talking about information being made available to Senators.

Mr. KLEINDIENST. What kind of information?

Senator KENNEDY. Well, just information that they request; information requested of the department. You draw a distinction—if I can finish—whether it is an individual member or subcommittee or full committee.

Mr. KLEINDIENST. To the extent that I can furnish information to the Congress, I do. I want to do it all the time, when I can. But in the



exercise of my responsibilities, whether you agree I am doing it right or wrong, I have a responsibility—I have to make a decision and I will make a decision.

Senator KENNEDY. How about internal memoranda? I am not talking about raw files.

Mr. KLEINDIENST. I do not like to furnish those because——

Senator KENNEDY. You do not like to furnish those?

Mr. KLEINDIENST. No, I do not, just as I am sure you would not want to if I wrote you a letter asking you to send to me the internal memoranda of your staff so I could determine how you go about your job.

Senator KENNEDY. Is that because of separation of powers or executive privilege or what, and what are we supposed to assume every time?

Mr. KLEINDIENST. I think you would have to assume every time you get a statement from me that that is a policy of mine with respect to the United States. But if it were pursued to an end where we might have a confrontation, then I would determine whether or not executive privilege would apply and if it did not, then I would supposedly be sitting down talking about a means by which we could furnish the material.

The reason I do not like to furnish internal memoranda is the same reason you would not want to furnish internal memoranda from your office. If the internal working papers—like a Senator's working papers or like, let us say, the FBI's where they have to go through this prosecutive process—were to be made public, I think it would inhibit the free unrestrained recommendations and thought processes of lawyers or other advisers. We would not be getting good, sound opinions and we would probably impose a real impediment on the criminal justice system.

Senator KENNEDY. Do you see a distinction between the importance of making information within the Government available to the public versus to those who have a responsibility in the legislative branch, or do you think it is the same?

Mr. KLEINDIENST. It is pretty nearly the same.

Senator KENNEDY. Do we not have a responsibility in oversight and considering legislation?

Mr. KLEINDIENST. Yes, you do.

Senator KENNEDY. Which in this sense demands additional information?

Mr. KLEINDIENST. I think that is probably true—yes, I think that is probably true, Senator.

Senator KENNEDY. You drew this distinction in making material available yourself and within the Department. Has that concept been passed on to other administrative agencies?

Mr. KLEINDIENST. I cannot answer that very precisely. I believe that we ought to make as much information available to the Congress and the public as possible. We ought to restrict very, very severely classification procedures, but there has to be some information. Determining what is the difficult part.

Senator KENNEDY. When Mr. Gray came up before the committee there was a good deal of discussion about continuing oversight of policies and practices of the Justice Department. Do you concur as a general matter that oversight is desirable?

Mr. KLEINDIENST. Well, without having thought carefully about it in order to discuss the subject matter today, Senator Kennedy, I certainly would have no objection to some kind of a means by which the Congress of the United States would have an oversight of the Federal Bureau of Investigation, much in the way that they had a general oversight with respect to our foreign intelligence operation. I think that is something that should occupy the considered time and attention of both the Executive and the Congress to do that. I think that fair-minded people could develop such programs which, at the same time would not interfere with the very vital and essential functions of the FBI. I would be happy to participate.

Senator KENNEDY. I would like to get back on this with you at another time.

My time is up, but just one more thing. In the Justice Department, you had a memorandum on the enforcement of the Freedom of Information Act out in 1969. A special Justice Department committee was set up to oversee the times that Freedom of Information Act requests were being denied in other agencies. I intended to get into that particular area since it involves the Freedom of Information Act.

Mr. KLEINDIENST. Senator, the letter which invited me here today invited me with respect to the limited subject matter of executive privilege. I did not come prepared to discuss the official secrecy or freedom of information problems. I would like to be better prepared and I will come back at a time mutually agreeable for us to do so.

Mr. Chairman, if I could make that statement, I am really not prepared on the other aspect.

Senator KENNEDY. This is on the Freedom of Information Act, which is of particular interest to—

Mr. KLEINDIENST. Just so the record will be clear, on March 16 Senator Ervin and Senator Muskie addressed a letter to me inviting me to be here. The first sentence of the second paragraph said, "We are writing to request that you personally testify at the hearings concerning executive privilege," and that is what I am prepared on today. I am not on the other, but I will prepare myself and I will be happy to come back.

Senator KENNEDY. Can we, Mr. Chairman?

Senator MUSKIE. I think that is a very useful offer. I had intended to get into the offer.

Mr. KLEINDIENST. I do not want to waste your time with me if I am not prepared.

Senator MUSKIE. Well, just if we could come back on other subjects, if that is agreeable. We will confine this to executive privilege.

Mr. KLEINDIENST. That is agreeable to me.

Thank you, Senator Kennedy.

Senator MUSKIE. Senator Roth.

Senator ROTH. Mr. Attorney General, Senator Ervin and myself introduced today a bill which would create a special commission to study the whole area of secrecy. I know you would not be ready to answer any questions on that today, but when you do return we will be questioning you on that piece of legislation.

Mr. KLEINDIENST. I will do my best to be prepared on it, Senator.

Senator ROTH. Thank you.



You stated that it was your belief that any evidence of wrongdoing should be reported to a grand jury. This raises a question in my mind in two areas if one agrees with that fundamental proposition. One would be what would happen in the case of impeachment proceedings. When I was on the House side there was an effort to bring about impeachment proceedings for a member of the Supreme Court. Would the House have the right in such a case to procure evidence or information with respect to charges affecting a man's right to continue to hold office?

Mr. KLEINDIENST. In an impeachment proceeding?

Senator ROTH. Yes.

Mr. KLEINDIENST. Where they are impeaching the President of the United States——

Senator ROTH. Not necessarily the President, an officeholder, a judge for example.

Mr. KLEINDIENST. If you are conducting an impeachment proceeding based upon high crimes and misdemeanors and you want to subpoena someone from the President's staff to give you information. I believe that, based upon the doctrine of separation of powers, the President would have the power to invoke executive privilege with respect to that information.

Senator ROTH. So that the executive privilege would still prevail even in those circumstances?

Mr. KLEINDIENST. Yes, in my opinion.

Senator ROTH. The second question concerns the General Accounting Office which was set up for the purposes of oversight.

Mr. KLEINDIENST. Yes, sir.

Senator ROTH. With respect to its activities, and, of course, the General Accounting Office directly reports to the Congress, would the Congress have the right to inspect evidence of funds being wrongly spent or of other wrongdoing that might lead to——

Mr. KLEINDIENST. Yes. All of us in the executive branch cooperate with the GAO in its function. However, I think that states its case. If a body created by the Congress to have overview on the executive wants some information from me and the President of the United States tells me not to give it to the GAO, I am not going to give it to the GAO, and if the Sergeant at Arms puts me in jail we will litigate that. But we will not vitiate the doctrine of executive privilege as long as I hold office.

Senator ROTH. Will you continue? Would you welcome a test case?

Mr. KLEINDIENST. I think somebody here this morning, it might have been Senator Ervin or Senator Kennedy or Senator Mathias, said that maybe the way this great magic of ours has worked with respect to separation of powers is we have managed to oil the joints. Because we have put ourselves in a flexible position as Senator Kennedy pointed out, so we have avoided this test. I am inclined to think we have the political process which has been the great oil by which our Government works. So if Presidents do things people think Presidents should not do, we have distinguished Members of Congress that point that out day in and day out, and the press and people pursue it and the people say we do not want you to do things like this. And if anybody else wants to be President, they will be told not to do those things.

None of us wants to detract from the Congress, judiciary, or executive. We are a great country because no one has.

Senator ROTH. I recently appeared in Delaware on a high school television show, and one of the questions the high school pressmen asked me involved a comparison between the so-called newsman's shield and the executive privilege. They asked if one is consistent in supporting the executive privilege and not the newsman's shield, since both are based upon a claim for a need of confidentiality.

Mr. KLEINDIENST. That is a happy, emotional kind of question to ask you, Senator. I do not know if it would be easy to satisfy the desires of somebody on the decision of what is constitutional and what is not constitutional. Our Supreme Court has said under the first amendment there is no absolute privilege of confidentiality by newsmen. You and I, and I think everybody in this room believes in 99 percent of the cases newsmen should have some protection of their confidential sources, but the privileges are not analogous at all, in my opinion.

Senator ROTH. Well, I expect to appear on this program again, so I was interested in your comment.

Assuming that we do move ahead with legislation, one of the bills under consideration sets out no particular guidelines as to what would fall within executive privilege, but leaves it pretty much to the Congress itself. Would you think that is preferable or do you think we ought to try to spell out guidelines establishing what is covered by executive privilege?

Mr. KLEINDIENST. Frankly, Senator Roth, I do not think either approach is preferable. I have serious questions whether Congress has the constitutional power to so legislate, and I think if it does it, inevitably there is going to be a constitutional test in our courts, and in my opinion, as a lawyer, the Supreme Court would say that the Congress exceeded its constitutional power by the enactment of such legislation.

Senator ROTH. In your testimony you say that an immediate staff assistant to the President should not be called before a committee for the avowed or apparent purpose of questioning his duties on behalf of the President. Would you agree that with the next layer of people, not those immediately confiding in the President, but say, the next level or third, you are getting on more tenuous ground with respect to executive privilege?

Mr. KLEINDIENST. I thought a great deal about that and logically you cannot determine those by categories or levels of sensitivity, because sure enough an exception would come along where a person very low down on the decibel scale had something to do with respect to the President or had something to do close to the President, and the President would say I am not going to let you go up there and testify. This is why this is a power to be invoked by the President personally. He very seldom does it. President Nixon did it only four times in 4½ years. Apart from the statistics that Senator Ervin gave us, that is all President Nixon has done.

But I think he has to do it, he has the power to do it. Under the Constitution he has that power.

Senator ROTH. I have been advised my time is up.

Senator MUSKIE. We will reserve another portion later.



Senator ERVIN. I am sorry I missed your oral reading of your statement, but I have read your statement.

Now, with respect to Senator Roth's statement, the Supreme Court did hold by a percentage of  $55\frac{5}{10}$  that a newsman had no privilege under the first amendment. I would say that the  $44\frac{5}{10}$  judges were right on the question because they agreed with me, and I would also say that the  $55\frac{5}{10}$  percent which held to the contrary were sort of shaky because Justice Powell wrote a concurring opinion in which he said what they decided would not necessarily hold in future cases.

Mr. KLEINDIENST. Senator, I am always nervous about disagreeing with you on constitutional law, but in this case I would disagree.

Senator ERVIN. I concede that while there is no statement in the Constitution on executive privilege, I believe there is room for it in a very limited area, and if I were to define it myself, I would define executive privilege in these words: "Executive privilege is the power of the President to keep secret confidential communications between the President and an adviser or even among the advisers of the President which are made for the purpose of enabling the President, of assisting the President, to exercise in a lawful manner some constitutional or legal obligation resting upon him in his official capacity."

I think that is the sum total of the sense for executive privilege.

Mr. KLEINDIENST. That is a well-thought-out statement, as is customary for you.

I think it is too narrow and I am also inclined to say I think it is academic because I think the separation-of-powers doctrine confers that duty and responsibility, if you will, to the President of the United States.

Senator ERVIN. I would say that is a statement of the principle, and that all other things are merely an application of the principle; for example, the keeping of secrecy in military operations to assist the President in carrying out his powers as Commander in Chief. The secrets with respect to diplomatic negotiations are to assist the President in carrying out his obligations in negotiations with foreign countries and his powers as a speaking voice in foreign relations.

Mr. KLEINDIENST. Can I add one footnote to that, Senator Ervin? In my opinion, I think the doctrine contemplates a means by which you can protect encroachment by Congress upon the powers of the executive branch, a diminution of the powers of that constituent branch of government.

Senator ERVIN. I think it was set up to cause friction.

Mr. KLEINDIENST. Senator Ervin, I am sure you would be the first one to rise up in fury if I wanted to conduct an administrative survey to inquire into the means by which the Senate operates in order to bring about legislation on the averment on my part and by telling the President what he ought to recommend. I would not even think about it. I am sure no Senator or Congressman would cooperate with it.

Senator ERVIN. I am sure it would be out of your domain.

Mr. KLEINDIENST. I would be impeached.

Senator ERVIN. I want to read from Bernard Schwartz's book, page 147. He says:

In actuality, there are no Federal cases in which the legality of the executive refusal to furnish information to the Congress was squarely at issue. What decisions there are involve executive privilege in courtroom proceedings, that is, cases where the executive refuses to furnish documents whose production is

demanding for use in litigation in the courts. Though some of these decisions go the other way, the great mass of them repudiates the concept of unlimited privilege in the executive in such cases.

It is not surprising that lawyers disagree, and I want to emphatically disagree with your statement where you say :

It must be borne in mind that determination of alleged violation of the criminal laws passed by Congress is uniquely the province of the Judiciary. For crime there can be no haven, and the White House has stated that even the President's close personal aides will respond to grand jury inquiry.

Those of us in the legislative branch of government believe that the power of Congress to require the attendance of witnesses and the production of testimony for legislative purposes is just as strong as the power of the courts to demand the attendance of witnesses or the production of documents for litigation purposes. It is true that our system of government permits through the courts the prosecution of people for violating the criminal laws passed by Congress, but it is likewise true that the Constitution has been held in many cases to give Congress the power to acquire information from witnesses or require the production of documents for the purpose of determining what kind of criminal laws ought to be passed and whether the criminal law has been in existence to deal with the situation. I am emphatically of the opinion there is not a single inference that can be drawn from the Constitution by which any individual in the United States occupying any position can refuse to comply with the demand of Congress that he furnish testimony or produce documents for legislative purposes.

Mr. KLEINDIENST. I would have to respectfully disagree, Senator. To get back to fundamentals, the Supreme Court held that President Andrew Johnson could not be directly proceeded against and compelled to appear in a judicial proceeding. Undoubtedly you feel that the President could be subpoenaed to appear before the Congress to testify, whether it is a criminal matter or any other matter. If he refuses to do so you can conduct impeachment proceedings. So what we are talking about is the extent of the power of the office of the Presidency and the extent to which he acts by other people, and that is where the difficulty comes about.

I believe, Senator Ervin, that if you are looking into certain forms of criminal conduct for the purpose of enabling you to repeal or pass laws, and you want a person on the President's staff to appear and give you information about it and the President of the United States directs that person not to appear on the basis of the doctrine of separation of powers and invokes executive privilege, you do not have the means by which to compel that person to testify.

Senator ERVIN. I do not propose to subpoena the President, but I say every individual in the United States is certainly under a legal obligation, which is enforced either by the courts or by Congress, to come and testify in the courts, or to come and give information to Congress that is necessary for legislative purpose.

Mr. KLEINDIENST. Yes, we agree on that.

Senator ERVIN. I do not think executive privilege under any circumstances covers wrongdoing. For example, if some Presidential aides decided, under the direction of the President, to set up a counterfeit machine in the White House and use the counterfeit money to pay



off the national debt I think the Congress could inquire into that operation.

Mr. KLEINDIENST. That may not be a bad idea.

Senator MUSKIE. Senator Chiles.

Senator CHILES. Mr. Attorney General——

Senator ERVIN. Oh, just one question. I would make one observation.

The reason I object to limiting Presidential aides to appearing before grand juries is this: That the people who are asking questions are holding their offices at the pleasure of the President.

Mr. KLEINDIENST. The Attorney General or U.S. attorney.

Senator ERVIN. And the testimony is given in secret and kept secret except when it is leaked to the press.

Mr. KLEINDIENST. That is in violation of a criminal law.

Senator ERVIN. The people of the United States could not keep informed as to what the executive branch of the Government is doing if Presidential aides could be summoned only before a grand jury.

Mr. KLEINDIENST. You are one of the great proponents for the interests of individuals in this country. There are constitutional safeguards when they might or might not be involved with a crime. We evolved a very complex system by which we prosecute people for crime and protect them in the meantime. I do not think those safeguards exist in the U.S. Senate or Congress. You are not designed——

Senator ERVIN. If they want to plead the fifth amendment it exists here just as it does in courts.

Mr. KLEINDIENST. That is why these grand jury proceedings are kept secret. There are connotations.

Senator ERVIN. I am in favor of them being kept secret, because I think the grand jury should stand between the man and his Government, and no man should be publicly prosecuted for a crime, without the legal protections to which he is entitled.

Mr. KLEINDIENST. Or publicly accused of it without proper safeguards. It seems to me if you acknowledge that principle, and I know how deeply you believe it, you might undo it or set it aside if you then say he can have a hearing before the Congress without those judicial safeguards with respect to criminal conduct and guilt and the exercise of constitutional rights.

Senator ERVIN. Well, the Supreme Court said in the case of *McGrain v. Daugherty* that Congress had a right to get information and the fact that it might disclose violation of some law by an officer of the Government does not prevent Congress from having that information.

Thank you very much.

Mr. KLEINDIENST. Thank you, Senator Ervin.

Senator MUSKIE. Senator Chiles.

Senator CHILES. On the same line of questioning, does it not concern you a little bit if the grand jury is the only place that the public could learn about the wrongdoing of a Presidential aide, for the criminal proceedings that might follow from the grand jury? Would there not be some concern of public confidence by the fact that all of the officers of that grand jury were in turn appointees by the President? You have a Presidential aide and a U.S. attorney. All these other people are appointees of the President, too. Where is the check in that system? Who is going to call the grand jury, the witnesses, who is

going to determine who will appear and testify? If this is the only means the public has of trying to determine——

Mr. KLEINDIENST. Senator Chiles, our Constitution is, I believe, divinely inspired, but the words were put down by mere human beings. It is not a perfect document. There can be abuses by the executive and by the Congress. When those abuses occur even by the Judiciary—and nobody seems able to do anything about it, then there appears a means by which the people can do something about it and in the ultimate sense you get down to the political process by which our Presidents and representatives are those——

Senator CHILES. Were not the framers of that Constitution trying to build in a check at every instance?

Mr. KLEINDIENST. Yes, they were. But you get into this area of separation of powers, Senator Chiles, even though you make the highly popular, highly emotional subject of wrongdoing a point of your argument, and let us say the Congress abuses its power, it asserts wrongdoing as a means to accomplish something else and in the name of redress of wrongdoing the Congress could impose itself upon the Presidency in derogation of constitutional validity. We would do a great deal of harm to the Constitution. That is why a President, in my opinion, has the power to direct a person associated with him not to appear.

Senator CHILES. The President's news statement on March the 12th where he talks about not covering up embarrassing information and the privilege will only be exercised in those particular instances in which disclosures would harm the public interest; who makes that judgment?

Mr. KLEINDIENST. That judgment is made by the President of the United States and only by the President of the United States.

Senator CHILES. Does that not make us a country of men rather than law?

Mr. KLEINDIENST. No, sir; because the power of the President is set forth in the Constitution.

Senator CHILES. Then the Constitution is a document and from that document we get the authority to make laws. You said something earlier, you did not think Congress could legislate in this field.

Mr. KLEINDIENST. Well, I think it can pass a law. I said that under the doctrine of separation of powers, the Supreme Court of the United States would say, in an appropriate instance, that it is unconstitutional. Lawyers are going to be arguing about that for a long time.

Senator CHILES. Does not article I, section 8 say "Congress shall make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested in this Constitution and in the Government of the United States, or any department or officer thereof."

Mr. KLEINDIENST. That is right, and Congress has passed a lot of laws that our Supreme Court said were unconstitutional. You attempted to enforce it, and somebody raised the question and then went to the Supreme Court and they said "Congress, you were wrong."

Senator CHILES. You think the Founding Fathers designed this document just to put absolute judgment in one man who held the office of the President at any time to determine whether he thought something was in the public interest or not?



Mr. KLEINDIENST. Well, it gave—you have to check on that, Senator Chiles—but it gave to the President just as to the Congress a determination of what information the President and Congress were to give each other. Unlike the President, the Congress has a remedy because if the Congress feels the President is exercising this power as a monarch or tyrant you have an impeachment proceeding. You could impeach the President of the United States. You would have a Speaker of the House of Representatives becoming the President. Then you could impeach the Judiciary and appoint a new Judiciary, and if you wanted to exercise your power you could end up with a whole new Government. That is what I said a moment ago. Leaving aside the normal remedy of impeachment, which I do not think will be used but once every 300 years, it is our political process which determines the ultimate result. It is not what Congressmen or Senators should or should not do. If they abuse their powers they have elections, and they do not come back.

Senator CHILES. So to follow on under that reason, you would say what is the genuine legislative purpose when the President says he only wants members called as a genuine purpose?

Mr. KLEINDIENST. Yes, he may be right or wrong, but that is his decision to make.

Senator CHILES. He would be the sole determinor of that?

Senator ERVIN. If you will pardon the interjection. I think under your interpretation there would be no danger of the President's being impeached because he could forbid any witnesses to testify before the Senate or court.

Mr. KLEINDIENST. I think you put a nice question, Senator Ervin, but you carried my hypothetical argument out to its logical extreme. If the only evidence necessary to impeach the President was contained in the bosom of his confidential adviser, I think his impeachment proceeding might not be predicated upon evidence. You do not need facts to impeach the President, because the Congress, if it has the votes, is the sole judge. The House passes a resolution, the Senate tries it, he is impeached, and there is no court of appeal. That is the end, with or without facts.

Senator MUSKIE. Mr. Attorney General, as I have decided, listening to you with a great deal of interest, and I might say, since you have asserted so vigorously—let me say at the outset that since you have asserted so vigorously your belief in your doctrine of executive privilege in a way that you have defined it this morning, I simply want to make it a matter of clear record that I disagree heartily.

Mr. KLEINDIENST. Somehow or another I concluded that, Senator Muskie. I will stipulate for the record.

Senator MUSKIE. Now, I would like to ask this question. I understand your definition. Congress has no power at all to command information or receive information from the executive branch; is that your definition?

Mr. KLEINDIENST. Only if the President of the United States directs a member of the executive branch not to appear or provide it.

Senator MUSKIE. So my statement is correct that the Congress in your view, has no power to command the production of testimony or information by anyone in the executive branch under any circumstances?

Mr. KLEINDIENST. If the President of the United States so directs.

Senator MUSKIE. If the President of the United States, as he rarely does, can veto, the Congress has no power to command; is that not true?

Mr. KLEINDIENST. You command my presence up here all the time and I am up here all the time, Mr. Muskie. If the President called me up at 8 o'clock and said, "Kleindienst, you are to go up there and testify before that committee but I am telling you not to do it," I will not come here. We will stipulate to that.

Senator MUSKIE. But you come here because you have decided you will do so, not because you concede our right to command you to do so. I have heard words all morning about we work this out with oil, cooperative discussion, with some kind of amicable arrangement. I am talking now about what the rights of the Congress are. Do we have the right to command you to testify against your will and better judgment?

Mr. KLEINDIENST. Well, my will or better judgment would have nothing to do with it.

Senator MUSKIE. But against the will of the President of the United States?

Mr. KLEINDIENST. If the President directs me not to appear I would not appear, no more than I would appear in your office and give you information you ask for.

Senator MUSKIE. So it is your opinion that the Congress has no power to command anyone in the executive branch or command the production of information in the executive branch; that we can get it only if the President agrees to provide it; is that your definition?

Mr. KLEINDIENST. Or conversely, we will provide it unless the President directs us to the contrary.

Senator MUSKIE. So our power to command is in the President's hands?

Mr. KLEINDIENST. Well, your power to get what the President knows is in the President's hands. Your power to get information from citizens is in your hands.

Senator MUSKIE. I am talking about 2½ million employees of the executive branch; do we or do we not have the power to command him to testify and——

Mr. KLEINDIENST. You do not have the power to command President Nixon to come up here.

Senator MUSKIE. That is not my question.

Mr. KLEINDIENST. That was an extension of your question which I have been trying to answer on three or four occasions, Senator Muskie.

Senator MUSKIE. You have fudged every answer.

Mr. KLEINDIENST. You do not have the power to compel me to come up here if the President directs me not to and even if you would attempt to compel me, I would not come here.

Senator MUSKIE. Does that apply to every one of the employees of the Federal branch of the United States?

Mr. KLEINDIENST. I think if the President directs it, logically, I would have to say that is correct.

Senator MUSKIE. Do you, therefore, disagree with this statement of Andrew Jackson who says,



Cases may occur in which it may be indispensable to the proper pursuits of its power that it should inquire or study upon the conduct of the President and other public offices and in every case its constitutional right to do so is carefully conceded.

I think if you disagree——

Mr. KLEINDIENST. I think he was really making a comment on a waiver that he had, as most Presidents have, and as most Presidents freely exercise. It is only an exceptional case that really brings this up.

Senator MUSKIE. Do you disagree with that statement?

Mr. KLEINDIENST. Well, I am aware of the fact that the President made it, but I do not know the details.

Senator MUSKIE. Do you disagree with the conclusion stated?

Mr. KLEINDIENST. That information by the Congress might be needed or indispensable? Sure, I think Congress could need an awful lot of information. But I believe President Jackson could have, if he so decided, instructed a person not to appear before you and you might have felt at the time that his appearance was very——

Senator MUSKIE. I asked you a very simple question, do you agree with that statement? He made this statement. It is on the public record. Do you agree with it or disagree with it?

Mr. KLEINDIENST. In relationship to the doctrine of separation of powers I believe he could have said it, but what it constituted was a waiver of that doctrine by the President.

Senator MUSKIE. It was a statement of his understanding of congressional power: do you agree with the statement or do you not?

Mr. KLEINDIENST. In the context of the way you are asking the question I cannot answer it. Senator, without studying the statement in context.

Senator MUSKIE. I will give you another. This is President Polk in 1846.

Mr. KLEINDIENST. Who?

Senator MUSKIE. President Polk. This is what he said:

If the House of Representatives is the grand inquest of the Nation——

And that is parliamentary language from the British experience——

If the House of Representatives is the grand inquest of the Nation and should at any time have reason to believe that there has been malversation in office and should think proper to institute an investigation into the matter, all the archives, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive afforded them to prosecute the investigation.

Do you agree or disagree?

Mr. KLEINDIENST. If that is interpreted to mean——

Senator MUSKIE. I have read it.

Mr. KLEINDIENST. I would disagree with that statement. If that was an expression of policy of President Polk of what he would do, that is a different matter.

Senator MUSKIE. I take it to be his understanding of the constitutional powers of the Congress.

Mr. KLEINDIENST. I respectfully disagree with the President in that statement.

Senator MUSKIE. I would now like to ask you about someone who is your subordinate, Miss Mary Lawton.

MR. KLEINDIENST. May I make a footnote just for the record? In my prepared remarks I think I quoted Thomas Jefferson when he said that he reserved "the necessary right of the President of the United States to decide, independently of all other authority what papers coming to him as President the public interest permits to be communicated." In other words, he carved out that exception himself, and recognized executive privilege.

Senator MUSKIE. When was that statement made?

MR. KLEINDIENST. I now see that it was Deputy Assistant Attorney General Lawton who used that language. The language was taken from the *Burr* case in her 1973 testimony, Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel.

Senator MUSKIE. This is not the question. There was this colloquy before the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations of the House on April 4 of this year. She was asked by Mr. Alexander.

Then you are agreeing that under your definition, that the doctrine of executive privilege should not be applied to wrongdoing of White House aides who may be involved in a criminal conspiracy?

Miss LAWTON. Well, you are asking me to endorse the "may be"?

Mr. ALEXANDER. I beg your pardon?

Miss LAWTON. Are you asking me to endorse the "may be"?

Senator MUSKIE. I will pass over that part of it.

Miss LAWTON. I think if there is a direct inquiry into wrongdoing by White House aides, there may well be no grounds to assert executive privilege.

Mr. ALEXANDER. I am not sure I understand your answer.

Miss LAWTON. Well, I think it would be proper, for example, to say for a White House aide who is specifically accused of criminal conduct to say, I do not want to testify before a congressional committee until I have appeared before a grand jury which has also summoned me.

Mr. ALEXANDER. Would not that be the personal right of that individual rather than going to the doctrine of executive privilege?

Miss LAWTON. Yes I think so.

Senator MUSKIE. Later she said, repeating, "I made that exception earlier. This is with respect to personal aides and advisors to the President. I made that exception earlier. I think if you are inquiring into the commission of a crime specifically."

Now, you, on the basis of your testimony this morning, take a different position on that question than Miss Lawton?

Mr. KLEINDIENST. Yes, I disagree with Miss Lawton.

Senator MUSKIE. There is another point raised in Miss Lawton's testimony in connection with a question—

Mr. KLEINDIENST. Senator Muskie, Mr. Dixon tells me Miss Lawton came back that afternoon and modified that answer with respect to the opinion. I was not there, but Mr. Dixon informs me she did. But I disagree with that first statement.

Senator MUSKIE. She got her marching orders?

Mr. KLEINDIENST. I am sure you give your staff marching orders, too, Senator Muskie.

Senator MUSKIE. You say she got her marching orders—well, you denied it, I guess.

You are certainly taking privilege as a protection of safeguards against allegations of crime for aides to the President. Well, now, why should they have a special safeguard that is not given to ordinary citizens, a special safeguard of this kind? Frankly, in all of my read-



ing on executive privilege I have not previously encountered the assertion that executive privilege exists for the President to protect his aides against allegations of crime.

Mr. KLEINDIENST. In terms of investigations it is an academic question whether he may invoke the privilege. No President has invoked the privilege regarding grand jury proceedings. President Nixon has stated he will not invoke it with respect to anybody on his staff. I do not believe any President would.

Senator MUSKIE. But if you say a criminal conspiracy involved the administration, its aides, the same administration appoints the Attorney General, the attorneys under it, determines what evidence will go before grand juries, what cases will be tried, and you say executive privilege exists in part to protect administrations against that kind of inquiry.

Mr. KLEINDIENST. Yes, sir, but only if invoked by the President, under the doctrine of separation of powers. That is to say, criminal acts of our citizens whether by a Senator or anybody else should be very carefully looked into under constitutional safeguards our system has evolved. No President has ever kept anybody on his staff away from the criminal justice system. But Presidents in the past have directed their staff not to appear before the Congress, and the privilege could go into something like that. In many instances they said go down there and talk about your criminal conduct.

We are talking about constitutional concepts in the American separation of powers system, not a parliamentary supremacy system.

Senator MUSKIE. You are talking about a congressional right and duty and responsibility that is well founded in the Anglo-American system. Legislative bodies, since the time of King John have been recorded as the frontline fighters for the protection of the rights of the free people to influence and control their government. The right of inquiry of a legislative body in the British system was unchallenged and unqualified. There is nothing to suggest the Founders intended to qualify it with respect to the Congress. They asserted that this right of inquiry stemmed from the British experience and no administration previously in my reading of the history of this doctrine has ever asserted it in as broad terms as you have this morning. I think it is a frightening concept.

Are there any other questions, Senator Mathias?

Senator MATHIAS. Very briefly.

Mr. Chairman, I think that the record does not fully reflect the Attorney General's views on one subject that we ought to get clear, because I do not believe that he meant to imply that we rewrite the Constitution at every election, that if a President engages in some practice which is of a dubious constitutionality, and he should be supported in a congressional election or reelection, that that would vest whatever he had done with any greater constitutionality than what he had done in the first place; do you agree with that?

Mr. KLEINDIENST. I agree with that.

Senator MATHIAS. And there is not much about a mandate of election when we are talking about a Constitution.

Mr. KLEINDIENST. I agree with that.

Senator MATHIAS. I was sure you did, but the record was not adequate.

Second, in your statement you made a dichotomy between privilege as applied to the judicial process and privilege as to the legislative process, and you have talked about the right of the executive to assert this in any case. I was heartened by your statement that for crime there can be no haven. But just to clarify the record as far as a legislative inquiry is concerned, you say as far as a crime it would be an act of grace on the part of the President whether or not one of his aides would respond to legislative inquiry.

Mr. KLEINDIENST. Yes, because crime in this country is prosecuted subject to our great civil liberties, it seems to me. We have the most intricate system of criminal justice the world has ever known. It is intricate because it is calculated to protect the rights of innocent people under our very sacred constitutional safeguards. The Congress, in my opinion, is not established or situated or set up in a manner to investigate or prosecute people for crimes. That is why we have an independent judiciary.

Senator MATHIAS. But this then, does become a special protection, and I understand exactly what you are saying from the point of view of civil liberties.

Mr. KLEINDIENST. It is a protection against abuse of executive power. You have an Attorney General and investigators who correct the process.

Senator MATHIAS. And granted people who hold positions have a special exposure.

Mr. KLEINDIENST. Sure. Sometimes the legislative process is abused. I almost left the Republican Party because of Senator McCarthy—that is why I say that when you get into the extremes of irresponsible conduct by the Congress or the executive branch of Government, the final determiner is the public of this country who make decisions like that in the electorate.

Senator MATHIAS. I think your part of the statement is clearly spelled out, but the immunity from the judicial process, would you say that the response of one of the President's aides to the command to testify was also a matter of grace?

Mr. KLEINDIENST. Well, it is so academic. Andrew Johnson said he could not be compelled to appear before a court. There is no President in this country ever going to, in my opinion, keep his close confidential advisers away from the criminal justice process. But in civil proceedings we do it all the time. Then pursuant to our regulations I write the proposed witness a letter and he then says to the court, that "By the direction of the Attorney General I must respectfully decline to testify." If that matter is raised by a judge he can set in motion a proceeding by which there can be a determination of it.

But I hope that the question in criminal proceedings will always be academic, just as President Nixon has said his staff is amenable to the grand jury process. Every President has, and I think every other President will.

Senator MATHIAS. It seems to me we could make it not only academic but immaterial if we could agree on it.

Mr. KLEINDIENST. What I say cannot affect the Constitution of the United States.

Senator MUSKIE. But what you practice can.



Mr. KLEINDIENST. It is the courts, Senator Muskie, that look at my conduct and behavior in addition to the Congress every day, and I am very carefully scrutinized by the Congress and the courts.

Senator MUSKIE. Whether we can do anything about what we see is what is before this committee today.

Mr. KLEINDIENST. You are doing pretty well.

Senator MUSKIE. Senator Ervin.

Senator ERVIN. Maybe I can sum up your testimony on executive privilege. You concede, I take it, that Congress does have the power to gather information for the purpose of enabling it to legislate wisely?

Mr. KLEINDIENST. Yes, sir.

Senator ERVIN. But you take the position that notwithstanding the fact that the Constitution impliedly gives this power to the Congress, that Congress cannot obtain any information whatsoever from anybody in the executive branch of the Government, or any document in the possession of the Government, unless the President specifically directs that it have it?

Mr. KLEINDIENST. Or conversely, if the President directs anybody who has a document or information or directs anyone not to appear, that person would have the power not to comply with the congressional request.

Senator ERVIN. Is that not what I said?

Mr. KLEINDIENST. I like the way I put it better in emphasis, for one, this President, all Presidents, 99.9 percent of the time cooperate with the Congress.

Senator ERVIN. Your position is the President has implied power under the Constitution to deny to the Congress the testimony of any person working for the executive branch of the Government or any document in the possession of anybody working for the Government?

Mr. KLEINDIENST. Yes, sir, and you have a remedy, all kinds of remedies, cut off appropriations, impeach the President.

Senator ERVIN. If we have no remedy, we can do what you say indirectly?

Mr. KLEINDIENST. Logically, I would have to agree with that statement, Senator.

Senator ERVIN. I think the *McGrain* case is inconsistent with that and also the *Jurney* case.

Senator MUSKIE. I think the answer is, Senator, the implied power of the White House to exercise executive privilege can be effectively used——

Senator ERVIN. I understand that the main duty of the President under the Constitution and the main thing he ought to do under his oath of office is to "take care that the laws be faithfully executed," and I do not believe the President has the power to make sure the laws are not used.

Mr. KLEINDIENST. If you ever found a President who abused his office you have your remedy and it is very carefully set forth, and if the new President abuses it you can get another one.

Senator ERVIN. That is to depend upon the executive branch of the Government. If the President forbids them to testify before the Senate, then the Senate would have no evidence with which to make adjudication.

Mr. KLEINDIENST. You do not need evidence to impeach a President. You get the resolution passed by the House and trial by the Senate and if the Senate votes on that trial, and if the Senate agrees, he is impeached. That is the end of it.

Senator ERVIN. You cannot try cases without evidence, even impeachment trials.

Mr. KLEINDIENST. Senator Ervin, that impeachment power should not be abused, is apparent. That is why Presidents do not abuse this privilege power. President Nixon has invoked this doctrine only four times.

Senator ERVIN. That is why the Chief Justice is sent over, to preside.

Mr. KLEINDIENST. Because you misbehaved yourself? I would say that the next impeachment would be the Chief Justice and we get ourselves a new Chief Justice.

Senator MUSKIE. You are tossing around proposals rather recklessly. Mr. Attorney General.

Mr. KLEINDIENST. Thank you for the honor and pleasure of being here, and I appreciate your hospitality.

Senator MUSKIE. We can, I hope, find a mutual time to discuss the other subject.

Mr. KLEINDIENST. Yes, sir. I will even do it if it is inconvenient.

Senator MUSKIE. Our next witness—may I say Senator Fulbright was scheduled to be our first witness. He will testify on Thursday.

For our last witness, I would like to invite Mr. Clark Clifford, who was legal counsel to President Truman and was Secretary of Defense for President Johnson.

We are delighted to have you here as our next instructor.

#### STATEMENT OF CLARK CLIFFORD, FORMER SECRETARY OF DEFENSE

Mr. CLIFFORD. I have a short statement. I believe I can read it in 20 minutes.

Senator MUSKIE. Senator Mathias would like to say a word to one of his constituents.

Senator MATHIAS. I would like to welcome one of my most distinguished constituents whose patience this morning, I think, has equaled his distinguished reputation.

Mr. CLIFFORD. Thank you, Senator.

As I listened to the Attorney General it occurred to me that your scheduling has been excellent, because I think the hearing this morning will turn into something of an adversary proceeding.

I welcome your invitation to appear here today because the subject of your 3-day inquiry is both current and important. I have the feeling that the public considers this matter to be of vital import and that it will view with increased interest the results of your inquiry.

So much emphasis has recently been placed on the question of executive privilege and the conflict between the executive branch and the Congress on this question that one fundamental fact is often overlooked. Although our branches of Government are separate, it has always been assumed that they will work together for the benefit of our people and the Nation. It seems to me that our system would work



more effectively and more efficiently if we were to place greater emphasis upon the responsibility of our branches to work in harmony rather than constantly to dramatize their separateness.

There has long been controversy over the right of the Congress to procure information from the executive branch. If the Congress is to be fully informed, it must get information from the executive branch of our Government. For Congress to function effectively, it must have the facts. In this regard, it is clear from decisions of our courts that Congress has a broad investigatory power. For Congress to legislate intelligently, it must be well informed. For it to be well informed, it must have a wide-ranging ability to investigate and procure the facts.

There has grown up during the years the tradition and general acceptance of the theory that certain types of information can be withheld by the executive branch when its disclosure would be inconsistent with the welfare of the country. There is no direct constitutional authorization for this privilege to be exercised by the executive branch, nor is there any case law that specifically adjudicates such authority on the part of the Chief Executive. In view of this status of the law, it would appear appropriate that the privilege claimed by the executive branch must be strictly construed.

There will always be differences between the Congress and a Chief Executive, but it is axiomatic that our Government operates more effectively when the Chief Executive makes every reasonable effort to comply with the requests of Congress in supplying the Congress with information through the medium of interrogation of witnesses or the production of papers, or both.

There was a reasonable basis to anticipate that the present administration would be liberal in supplying information to the Congress and in making witnesses available for purposes of interrogation.

In 1948, when President Nixon was a member of the House of Representatives, an effort was made to obtain certain information from the Secretary of Commerce. At that time, President Truman issued an order denying such information to Congress. Speaking on this subject on the floor of the House, Mr. Nixon made the following statement:

I am now going to address myself to a second issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that, therefore, the Congress has no right to question the judgment of the President in making that decision.

I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the Executive Department and the Congress would have no right to question his decision.

Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits.

Also, on March 24, 1969, President Nixon sent a memorandum to cabinet officers and heads of agencies which read, in part, as follows:

The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive Branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous

inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval.

Further encouragement was given from a comment by President Nixon at a news conference on January 31, 1973, when he stated the following:

I will simply say the general attitude I have is to be as liberal as possible in terms of making people available to testify before the Congress, and we are not going to use executive privilege as a shield for conversations that might be just embarrassing to us, but that really do not deserve executive privilege.

Again, on March 12, 1973, President Nixon made the following statement:

Executive privilege will not be used as a shield to prevent embarrassing information from being made available but will be exercised only in those particular instances in which disclosure would harm the public interest.

The hope that the executive branch would be readily forthcoming with information was seriously and adversely affected when President Nixon on March 12, 1973, informed the Congress that members and former members of the President's personal staff would not be permitted to testify in a formal appearance before a committee of the Congress. This constitutes an exceedingly broad restriction and, in addition, goes farther than any other President has gone. I do not recall any other President contending that executive privilege attaches to individuals who served in the White House but who have since left and returned to private life.

Apparently, the Watergate incident has had a great effect upon President Nixon's attitude. Many writers and many officials of both parties have recommended that there be a full and complete disclosure of the part played by staff members within the White House but these recommendations have been ignored.

We know from legal proceedings that have already taken place that a group of men invaded Democratic headquarters for purposes of surveillance and sabotage. Seven individuals have either pleaded guilty or have been found guilty in a jury trial. We know that funds paid to these individuals came from the Committee to Re-Elect the President. A Mr. Liddy was apparently in charge of certain phases of the operation and he has refused, and continues to refuse, to testify from whom he received his orders. Congressional committees engaged in an inquiry into possible wrongdoing, have desired the testimony of staff members in this limited area. Mr. John Dean, who is on the White House staff, apparently has substantial information regarding the Watergate affair. Mr. Nixon has informed the Congress that he refuses to permit Mr. Dean to testify before congressional committees.

The President of the United States, at different times, wears four separate hats. He wears one as Chief Executive of the Nation. He wears another as Commander in Chief of the Armed Forces. He wears another as chief ceremonial officer of the Nation. His fourth hat is that of political leader of his party.

While one can visualize situations in which a President could properly preserve the confidential relationships that develop while he is wearing the first three hats, it is difficult to believe that the same privilege is created when he is wearing his fourth hat as head of his political party. In his political capacity, he is not engaged in contacts



with foreign powers or with the usual duties associated with the office of the Chief Executive. The Watergate scandal falls solely and dramatically within the political field. In the conduct of the reelection campaign and related matters, staff men working for the President are also functioning in a political capacity. It would seem to me that when a President has his political hat on, and members of his staff are serving as extensions of his political operations, no privilege extends to their activities any more than some type of privilege would extend to the political head of the opposition party. These activities are clearly outside the nature of their employment in the Nation's business.

The Congress and the executive branch have been at odds over the years regarding the obligation of the executive branch to furnish the Congress with information. It might be of value, at this time, to attempt to lay down guidelines that would help solve this dilemma.

It is my opinion that executive privilege can exist only when its invocation serves the national interest. Certain simple commonsense tests can be employed in this determination:

(1) Where the inquiry is being made into activities of subordinates performed outside the regular course of their employment, the withholding of information on claim of executive privilege cannot be in the national interest.

(2) The protection of confidential communications between a President and one of his advisers has classically been considered to be in the national interest because it insures the full and candid expression of views which assists the President in discharging his responsibilities.

(3) Any claim that the national interest is served by the withholding of information under other than these limited circumstances requires that the executive branch bear a very heavy burden of proof.

As an illustration, any personal involvement Mr. Dean may have had in the Watergate scandal would not constitute activity in the regular course of his employment. Accordingly, I am persuaded that the withholding of Mr. Dean's testimony would not be in the national interest. I believe the exact opposite to be true.

It is my belief that Congress must have a broad range of authority to investigate alleged wrongdoing in the executive branch. If executive privilege is improperly used, then facts can be concealed within the executive branch that should be publicly aired so that the Congress and the people will be informed. The answer is sometimes given that a grand jury can be summoned and the public is protected through the normal functions of a grand jury inquiring into alleged wrongdoing. From a practical standpoint, this is an inadequate remedy. Representatives of the executive branch control the operations of a grand jury and have sole discretion as to what evidence should be presented to the jury and what evidence should be kept from the grand jury. This does not constitute a sufficient protection for the honest and effective operation of our Government. One must keep in mind also that one of the historic arguments made by the executive branch in support of the privilege is that a President should be able to talk in complete confidence with members of his staff and, therefore, such individuals should not be subjected to congressional interrogation. It would be appropriate at this point to suggest that the Congress would very likely be willing to refrain from questioning White House staff men on their conversations with the President. What they are inter-

ested in are the contacts that such individuals have with those implicated in the Watergate affair, and other actions of the Committee to Re-elect the President, which subverted the country's political process.

Another way of looking at it is to suggest that if President Nixon was fully informed with reference to the Watergate affair and discussed it in detail with his staff before and after the events took place, the argument might be made that such conversations were privileged, but if President Nixon should take the position that he knew nothing of the Watergate case, and was in no way involved, then I am unable to understand how a claim of privilege could be asserted. Under these circumstances, the doctrine of executive privilege is to protect the relationship between the President and the staff members involved. It would seem to me that if there is no such relationship existing with reference to the Watergate affair, then no privilege can exist. I do not see how a President can have it both ways.

This point was touched upon obliquely within the last few days when a Justice Department official testified before a House subcommittee regarding their desire to have Mr. John Dean testify. Such official stated that President Nixon could not invoke executive privilege if the Congress at the time was specifically looking into the question of wrongdoing or the possible commission of a crime. The daily press quotes the Justice official as saying, on April 4, 1973, the following: "If you are inquiring into the commission of a crime specifically, then the privilege does not apply." The press further reports that, after a luncheon recess, the official changed her testimony and stated that the President alone has the prerogative of deciding whether there has been any wrongdoing and, therefore, of determining whether to invoke the privilege. The testimony of the official in the morning recognized the investigatory rights of the Congress, but such right was completely nullified in the afternoon by advancing the argument that the President was the sole arbiter as to whether there had been any wrongdoing. The Justice Department giveth, and the Justice Department taketh away.

Another position taken by President Nixon has caused widespread comment. He stated recently that executive exemption extended not only to persons still in the employ of the White House, but even to those who had left Government and returned to private life. It was quickly noted that such policy would cover Mr. Chapin, who served as appointments secretary to President Nixon during much of the period involved in the Watergate affair and other political subversions. If this principle is carried to its logical conclusion, it would apparently mean that a few days or a few weeks spent in the White House would provide a lifetime immunity to such employees, unrelated to his confidential communications with the President. Can one honestly believe that any such principle exists within our system of government?

The privilege has been extended in other ways also. For example, I note that the General Accounting Office testified the other day that Mr. Dean, last November, refused to provide passenger manifest data for Presidential aircraft. He stated at the time that "such information has traditionally been considered personal to the President and thus not the proper subject of congressional inquiry." The privilege has now been expanded to all areas which are considered personal to the President.



It is clear that we have reached a complete impasse. The Congress has continued to exert its right and need to get the facts while President Nixon and his representatives contend in effect, that the President has unrestricted discretion to withhold information from the legislative branch. Under these circumstances, the Congress can grumble and complain about the President's lack of cooperation. They then can hold some additional hearings and, when it is all over, be right back where they started from.

I suggest that the time has come for a showdown. The Watergate case and subsequent political subversions present clear issues. I favor obtaining a judicial determination of the issues that have been raised.

An appropriate witness can be asked to appear and, upon declining, can be subpoenaed. Failure to appear can be treated as contempt of the Congress and a justiciable controversy can be brought about. A full record can then be made of the facts involving the witness in question and the need of the Congress and the people for the facts regarding the witness' participation in the claimed wrongdoing. Perhaps it would be advisable to combine the issues raised by the protection extended to Mr. Dean and Mr. Chapin.

It is not necessary that the present impasse be permitted to continue indefinitely. Although it will take a considerable period of time, there can ultimately be a clarification by the courts that will guide Members of Congress and those in the executive branch. It appears to me that two major tests regarding a witness can be presented to the courts:

(1) Is the inquiry directed to the activities of an employee, within the official scope of his employment?

(2) Even if the questioned activities were within the scope of his employment, is it nonetheless in the national interest for the employee to testify?

It appears that the national interest question is the most vital. Congress contends that the national interest demands certain information. President Nixon replies by saying that the national interest demands the concealment of certain facts. Some might consider that the expression "national interest" is an unduly broad term but, in the past, other broad terms have been used and our courts have defined them. The 5th and 14th amendments to our Constitution use the expression "due process of law." This expression has very broad implications, but the courts have given us clear guidelines by their interpretations under various circumstances.

This committee has before it for consideration S. 858, a bill introduced by Senator Fulbright, and S.J. Res. 72, a joint resolution introduced by Senator Ervin. I prefer the Ervin resolution to the Fulbright bill. There would likely be considerable controversy over the Fulbright bill and a possible veto if it were passed. I think this would cloud the issues. The Ervin resolution, on the other hand, is not susceptible to a veto and provides a procedure that could lead to a clarification of this troublesome issue. Moreover, the purpose of Congress at this stage should be to declare its understanding of the purpose and limits of the doctrine of executive privilege. What is required is not new legislation, but a clarification of the implications of the constitutional separation of powers.

It is my recommendation that the Ervin resolution be acted upon and that the groundwork be laid to present a case to the courts. The cir-

cumstances surrounding the Watergate scandal and related incidents, and the witnesses involved, present the basis of a case to be submitted to the courts. I do not know when a better set of facts will ever be presented to the Congress. It is my opinion that the doctrine of executive privilege has been broadened to an unacceptable extent, and I believe that the courts would so rule.

I feel strongly that the public interest demands that steps be taken to settle the question. The result, in my opinion, will be that the Congress and the people will have access to information that is now denied them.

Thank you, Mr. Chairman. That ends the statement.

Senator MUSKIE. Thank you.

Senator Ervin has to get to the floor in connection with legislation. So with deference to him, without objection, Senator Ervin will begin the questioning.

Senator ERVIN. I just want to commend you on what I think is the most total and succinct statement I have ever read on executive privilege. It also affords a very practical way by which to determine whether executive privilege applies in a particular case.

As I interpret your statement, there is a necessity for the President to receive from his advisers uninhibited advice when he undertakes to decide what course of action should be taken in making some decision with respect to performance of his constitutional legal duties: is that not true?

Mr. CLIFFORD. Yes, sir.

Senator ERVIN. As you point out, if the President had no connection with the so-called Watergate affair and had no knowledge of the Watergate affair, there is no basis whatever for the invoking of executive privilege, is there?

Mr. CLIFFORD. That is my belief.

Senator ERVIN. Do you know of any instance where executive privilege has been invoked to conceal illegal conduct?

Mr. CLIFFORD. I am not familiar with such an incident in our history.

Senator ERVIN. I think you have set out the three salient rules, which are very simple, and I think are easier by application, by which we can determine in a particular case where the executive privilege ought to be sustained.

As I say, I want to compliment you on it because I do not think it would be possible to phrase better a statement of the theory of executive privilege or to provide a more practical way of measuring in a given case where the executive privilege could be invoked.

Mr. CLIFFORD. I noted with interest that some 2 years ago in 1971, you conducted lengthy hearings. You had scholars and lawyers and Government representatives and maybe 800 or 900 pages of testimony, and it was a very scholarly work, but it did not get anywhere. Now, here we are, April 1973, and we are where we were 2 years ago when those hearings started, or even 4 years ago or 5 years ago. The situation that confronts us now was dramatized by two opinions by Attorneys General, one back in about 1954 and one again in 1958. In both of those instances there is an expression used that I think clarifies this issue. Each time the Attorney General stated that a President of the United States has "uncontrolled discretion" as to what evidence or



witnesses he will permit to be produced. As I listened to the Attorney General today he did not use that expression, but that was the thrust of his remarks. If the President says no, a witness does not go. There may be 2½ million employees in the executive branch of the Government. Mr. Kleindienst says if the President says no, even the lowest shall not go.

It seems to me we have a clear and concise and unalterable conflict. I would venture that under these circumstances, we could go through this hearing, and you could have another hearing 2 years from now and we still would not know what the ground rules are.

I suggest that an invitation be issued to a White House staff member. If he declines to appear, he should be served with a subpoena. If he still fails to appear, the sergeant at arms should go to his home and arrest him. He should then be brought to the Senate and placed under technical detention. His counsel would then go to the court for a writ of habeas corpus. In this manner a clear court decision would be obtained. The issues would be: One, did the acts of the staff member occur within the ordinary course of his employment? If they did then you have to look further. But if they did not occur within the ordinary course of his employment you do not have to go any further. His actions are not subject to executive privilege if he was operating outside the scope of his employment.

One might find in the Watergate situation that this set of facts would occur in a number of instances.

The second issue is: If the individual is operating within the course of his employment, then, would the concealment of that evidence, or in other words the refusal to permit that evidence to come out be in the national interest? I think the court would look at that with considerable interest.

My own view of it is that I know of no reason today why staff members in the White House, possibly involved in the Watergate, should not be produced. What possible claim is there that if Mr. Dean or Mr. Chapin or any of the other men involved refused to testify that that would be contrary to the national interest? Mr. Nixon has not told us what the explanation is. Mr. Kleindienst has not told us. No one has told us why it would be contrary to the national interest for these men to appear and testify before the Senate committee. We have already gone through the grand jury inquiry and the charade of a trial. Only a carefully selected part of the facts were presented to the grand jury. Only certain issues were raised within a very narrow area in the course of the trial. Each day the play went on. But it was not a trial I would refer to ordinarily as representative of our system of jurisprudence where you have two sides engaged in an adversary proceeding. It looked to me more like the opponents were partners.

Senator ERVIN. One time I was holding court, and a man wanted to be excused from the jury panel on the grounds he was deaf in one ear, and I said, "We will wait to see whether you will be selected to be on a grand jury, because a grand jury hears only one side of a case."

I certainly agree with you it is time for a showdown if we have to have it on this question. I sincerely hope that the President will relent and permit White House aides to come down and give testimony so that the hearings can be completed in a reasonable time.

But so far as I am concerned, and I believe the majority of the Senate will agree with me, we will have a showdown if it is necessary. I think apart from other considerations there have been certain charges in news media concerning White House aides, and I should think they would want to come down and testify before the committee, if they are innocent of any wrongdoing; and I think the President ought not to require them to be branded with a stigma which they are denied by him the right to remove.

I think the Attorney General mentioned the rights of innocent people, and it seems to me that an aide who has been unjustly charged in the news media ought to have a right to come down and vindicate his reputation and not be deprived of that right by the President of the United States or any other person on the face of this earth.

Thank you very much. I hate to have to go at this point, but I must go to the Senate floor.

Senator MUSKIE. I think there is another ambiguity in the record. Is executive privilege something to be asserted by the President in all cases himself?

Mr. CLIFFORD. I believe that it started that way, but it has now become so expanded that we have any number of persons asserting that particular privilege. Incidentally, I listened with interest when the question was asked, "when was the expression of 'executive privilege' first used?"

An investigation of that has been made, at great length, by an excellent scholar and he found it was not used by Presidents Washington or Jefferson or Madison. It was not used at any time in the 18th century or the 19th century. It was not used until the Eisenhower administration, and then for the first time the expression "executive privilege" was launched. Now it is presented today as though it were advanced by President Washington.

But getting back to the question that you asked. It seems to me that we are not resolving it now because Mr. Kleindienst's statements today are the same that were given back in 1954 by Mr. Brownell and in 1958 by William Rogers, who was then Attorney General. They took exactly the same position then that Mr. Kleindienst takes now. I think it is a matter of fact, instead of our making progress we have retrogressed because the theory has been extended more widely all the time.

Senator MUSKIE. I am inclined to agree with you that perhaps we have reached the point where we ought to resolve this by a procedure similar to that which you have described.

As a matter of fact, if I recall one of the President's recent press conferences he welcomed a judicial resolution. So I take it he would not take offense if the Senate should decide?

Mr. CLIFFORD. He did specifically say he would welcome a judicial test of this issue.

Senator MATTHIAS. I was impressed, Mr. Chairman, by the clear and thoughtful statement Mr. Clifford has given us. I subscribe to the thrust of his argument.

To be the devil's advocate for a moment, I would like to probe on his advice that the time has come for a confrontation on this subject. Among country lawyers we often think a thin file with a release in it is better than a Supreme Court judgment sometimes. I am reluctant to see a kind of final confrontation at this moment in history between



the executive and the legislative branches which in itself would be an admission that the element of good will that has sustained this antique Constitution of ours so long has finally failed. Checks and balances have built into them the constant threat of a confrontation which brings the whole system to stalemate.

It seems to me it would be almost the first time in our history, save, say, for the Civil War itself, where the Constitution has failed us, that we have come to a point where the Government simply cannot by actions of men of good will working together solve this problem.

I wonder if you see any possible solutions to this problem, as grave as Senator Ervin has painted it and as you paint it.

Mr. CLIFFORD. One alternative would be for President Nixon to change his position. That would solve the problem. I do not see any present likelihood of that occurring.

Another alternative would be for the Senate to indicate they have changed their attitude and they do not want to call the witnesses up. I do not think that is a very attractive position.

The Supreme Court has resolved many issues that have involved our Government on important questions.

At one time the Supreme Court had to settle the question as to whether it had the right to declare that the actions of another branch of government were unconstitutional. That decision was made and the Court accepted that responsibility. In this particular instance I do not know who is going to give. I do not expect President Nixon is, and I do not expect that the Senate is.

It does not alarm me, as a lawyer, for us to go about our business as we would ordinarily and contemporaneously get a court test of this impasse. I think that when a court looks at the question: it is in the national interest to expand the theory of executive privilege as enormously as it has been expanded, I think the court is likely to say "No." Also I believe guidelines would be set that would be of value. This might not occur in just one decision. It might answer certain of the questions and then later there might have to be another case that would be taken up. We have reached a point where we make a justiciable controversy over the issue and turn it over to the judicial branch.

Senator MATTHIAS. It seemed to me we both came to the conclusion there was some area of confidential discussion by the President himself with his close advisers that we agreed should be immune from scrutiny, and it might be that if the court were to render decisions with guidelines which would require a President to state very clearly the grounds for invoking the decision and specifically for the grounds that it involved him in some specific way, that we would introduce an area of accountability that is consistent with our Government.

Mr. CLIFFORD. Right. That is an excellent approach to it and there is this in addition. We have no rules now. It is suggested in legislation that the Senate and House declare that when a witness is subpoenaed that that witness must come before the proper House. That is meaningless if the President directs the witness not to come. I do not like to see the Congress take action which comes to no result.

What the Supreme Court can do and what the Congress cannot do is state that the President has no right to prevent the appearance of a witness. That witness shall appear in answer to an invitation or a subpoena, and then that witness shall testify on those matters not limited by privilege.

As it is now, one reason we are at a complete impasse is because you do not even get the witness before you. You are not able to inquire. Now, I can see where an excellent record could be made in that regard. The record would show the questions asked and the refusal of the witness to answer those questions and his acquiescence in answering some of them. That whole record could go on up to a court and the court would decide whether the President had acted constitutionally in forbidding the witness to testify in certain areas. There is a great deal of benefit in that course of action.

What bothers me now is you are on absolutely dead center. You do not even get the witness to appear to interrogate.

Senator MATHIAS. I do not aspire to emulate Senator Ervin in quoting Scripture, but I would suggest this committee would write a record that would convey a record and that the handwriting on the wall might be read and understood and that we might avoid the confrontation which you seem to see is inevitable, because it is just one more controversy and I think could be very bitter before it is played out.

We have done a lot of choosing up sides in this country in the last few years, and while that is not always a bad thing, while some tension can be constructive and positive, I would like to see us avoid this if we could on a sound basis.

Senator MUSKIE. Well, I think that we are pushed to that confrontation because of the quantum jump in executive privilege that has taken place in this administration.

Now, I can recall earlier this year when I was discussing this with Senator Ervin. He stated the very same concept that Senator Mathias did, was the right of the President to have confidential discussions with those close advisers. Now we have it asserted by his Attorney General that this is no longer a privilege related to communication between the President and those people whom he advises, but it is a form of personal immunity for those who happen to work for him in the executive branch and as such it covers everything they might conceivably know within the course of their employment or outside of it. That is an incomprehensible expansion of the principle if it exists, and I think of some concern, and I like your suggestion: that we ought to find a way. I think the only way we will find it is to get the courts to recognize it, a way to bring witnesses before us so we can get at the question of what questions should they be required to respond to and which ones not.

Mr. CLIFFORD. I agree, Senator Mathias, that there are areas that should be privileged. I believe that strongly. What started out to be a reasonable theory that would add effectiveness to the operation of our Government has now, it seems to me, been inflated beyond all original concepts. Now no one can appear from the executive branch unless the President has ordered him to do so. No one can appear if he has worked for the President, or even if he has previously worked for him. It seems to me it shuts off from the Congress the right to acquire information that in some areas only the executive branch can furnish.

It is generally recognized that the executive branch has become more important and the legislative branch less important, that is, in the impact they make on the life of the Nation. I believe this would be a step to correct the imbalance that has already come about.

Senator MUSKIE. Thank you very much, Mr. Clifford.



Professor Miller, who is working with our staff, has a few questions.

Mr. MILLER. I have one question, Mr. Clifford, perhaps prefaced by an observation. You heard Mr. Kleindienst say he is asserting a divine right of rule from the President. I am not sure you would agree with that.

better to legislate a comprehensive statute setting forth Congress' position with respect to executive privilege? That is, not let it go for years and years. It seems to me it could go on for another chain of 20 or 30 years if you leave it up to the courts.

As a part of that you are asking the court—you are saying to the court I understand the court does legislate—in the abortion case and *Miranda v. Arizona* and so on; and I think some Senators, including Senator Ervin, disagree with some of those propensities of the Judiciary.

Mr. Kleindienst seemed to read the “necessary and proper clause” out of the Constitution saying, in effect, that he thought the Supreme Court would say that the Congress does not have power to make all laws necessary and proper for carrying into execution the mandates of the Constitution. Do you agree with that? That is a two-part question.

Mr. CLIFFORD. The first part, having to do with the question as to why doesn't the Congress pass a bill that would cover——

Senator MATHIAS. May I interrupt you just a moment because it follows the line of thought I was advancing.

Are there any other alternatives to a confrontation? It seems to me more important than what is asserted today or more important than what has been asserted at other points of time is the issue of what ought to be the proper operation of the Government. That ought to be our guiding rule here, and perhaps the suggestions of Professor Miller lead us more nearly in that direction and more nearly toward the fulfillment of our Constitution than a confrontation which moves the conflict into the area of the court.

Mr. CLIFFORD. When you talk about proceeding along the legislative route, I am sure an excellent bill could be prepared and the position of the Congress, the procedure, the machinery within the Congress to obtain investigatory rights could be clearly set out. Then, in my opinion, when you finish it you do not have anything, because the President says, in effect, you have certainly prepared an interesting bill and now you want Mr. Dean to appear and I have instructed Mr. Dean not to appear. We are right back where we started from. I do not know what effect legislation would have because the President has said I am not going to be bound by any legislation that the Congress passes in that area because of the separation of powers. You have no control over me. You cannot subpoena me, and, therefore, you cannot subpoena any of those who work for me.

Senator MATHIAS. I would just observe that if we frame a bill, and the President vetoes it, and it is passed over his veto, then for him to totally reject the mandate of the bill, I think represents a degree of intransigence that I hope would never exist in any country. Let me say I would take whatever steps and initiate whatever steps are neces-

sary in that case, and I will go as far as any member of this committee and Senate in that respect.

Senator MUSKIE. I would not be surprised in the event of the hypothetical situation you proposed if the Attorney General proposed not to veto the bill but not to be bound by it. It seems to me his argument on the basis of separation of powers is that he does not have to be concerned on that legislation, just to ignore it.

Mr. CLIFFORD. I hate to see the Congress take a position that is just a nullity. I think when the courts take action the law should be set and delineated and then it should be obeyed. I believe I already know the result if you pass a law today. Because of the opinion we have heard this morning we would not get the witnesses and we would have gone through, I think, a useless performance.

There are other procedures that might work. If the Congress started down the judicial road, perhaps the fact that they started to make the issue might bring about reconsideration on the part of the executive branch. They have already made some decisions that show a lack of complete confidence in their position. One is they have said we are not going to let you have the witness up there to examine, but if you will send written interrogatories to the witness in the White House he will answer those questions which the President permits him to answer. Now, that, I think, shows some lack of confidence in their position.

Another thought that has been advanced is that the witness desired by the Congress might appear and have an informal conference with members of the committee. He would not be under oath and he would then select whatever questions he wished to answer. Both of those offers are, I think, unacceptable, and I hope the Congress continues to take the position they are unacceptable. They will not produce what the Congress desires and that is the actual honest facts that have taken place in these particular circumstances.

Senator MATHIAS. Well, it would be unacceptable to me as a member of this committee, certainly.

I am reminded of a story that was told to me by an old Army hand the other day about some controversy that took place in the maintenance of a hospital in Hot Springs, Ark., and the commander finally wrote in to the organization that no member would be paid if that hospital were closed. So the hospital remained open for a good many years.

Senator MUSKIE. You would not call that a confrontation.

Mr. MILLER. I think there is one benefit of legislation. It would take only one Supreme Court decision to validate that. Your suggestion is a case by case—analogue to litigation. I think this is different and there ought to be comprehensive things legislated now. I think that it is the Congress and not the court which should legislate that.

Senator MUSKIE. Thank you very much, Mr. Clifford.

I announced earlier that Senator Fulbright will testify on Thursday. He cannot testify on Thursday, so we will meet at 2:45 to hear Senator Fulbright.

[Whereupon, at 1:45 p.m., the hearing was recessed, to reconvene at 2:45 p.m., this day.]



## AFTERNOON SESSION

Senator MUSKIE. The committee will be in order.

It is a pleasure to welcome my chairman of the Foreign Relations Committee, Senator Fulbright, who has had a longstanding interest in this field of inquiry when the public interest was not as intense as it appears to be at the present time.

So I think it is very appropriate that we should have this testimony.

I am sorry that your preoccupation downtown prevented you taking first place on the witness list this morning, but I am sure that your testimony will be fully as welcome.

**STATEMENT OF HON. J. W. FULBRIGHT, A U.S. SENATOR FROM THE  
STATE OF ARKANSAS**

Senator FULBRIGHT. Mr. Chairman, I do apologize. The White House just called yesterday afternoon and asked us down for a briefing this morning at 8:30 on the trade bill and tax bills. I thought we might be through by 10, but various things delayed us; the President was very interested in this subject. I was in a dilemma and didn't know whether to leave. It isn't considered very good form to leave in the middle of the President's statements, as you know. I regret very, very much that I am late.

As you have said, I have testified on this subject before, and I consider it one of the most important ones. I have prepared a written statement, which I would like to read.

The testimony of the Attorney General this morning really took me aback. I was amazed at the extent to which the Attorney General is seeking to extend and expand what I would call the arbitrary abuse of executive privilege.

I do not say there is no such concept as executive privilege. I don't think any of us do. We have recognized it as a matter of comity largely.

Executive privilege isn't in the Constitution, but as a matter of comity and to make this Constitution work, we recognize we have due respect, let us say, for the other branches of the Government. But I never have departed from the idea, and I don't today, that the basic power of governing is distinctly and unequivocally given to the Congress in the Constitution.

The members of this committee maintain strict construction.

Much was heard about strict construction of the Constitution at the time the Supreme Court appointments were made. The President said he was looking for strict constructionists. He undertook to find them.

I don't consider he has found one in the Attorney General as I remember what he said this morning, because if that isn't an elastic interpretation of the Constitution, to say that this concept of immunity from response to a congressional summons to testify extends to all members of the entire executive branch, I never heard anybody talk about this subject before.

I have been saying it doesn't even extend to the White House staff. I have been saying it extends, if at all, not to any person at all as a person. I have never thought of this as giving some man, a Joe Smith or Bill Smith or Mr. Dean or anyone else, immunity.

The privilege goes to the information between a visitor to the President and the President or vice versa, to give them a degree of privacy in their communication. That is all I thought it ever meant, and we accept that, as I say, as a matter of comity between people.

Members of the executive branch should be entitled to communications with their confidential assistants. I accept that. What we are concerned with is not the existence of that type of thing, but the abuse of it, the extent of it. That is what has concerned me.

My prepared comments are not going to seem very responsive to this extreme extension of the coverage as it is evidenced by the Attorney General's remarks this morning, because my text was prepared before I heard his testimony.

I recall Mr. Katzenbach, a former Attorney General, testified before the Foreign Relations Committee a few years back and in effect said that the Constitution is obsolete with regard to the war power. He just dismissed it. We were all shocked that he could by just a wave of the wand make a major provision of the Constitution obsolete. And I may say we rejected it. I think everybody on the committee rejected that idea.

Of course there is the famous memorandum of another Attorney General, William Rogers, who is now the Secretary of State, back in 1958. I don't know of any reputable lawyers who have accepted that theory.

But in my view the remarks this morning go far beyond either of those statements in this area. This is an area which is fundamentally significant: this power to withhold information from Congress is the power to strangle the Congress.

If the Congress, and especially the Senate, does not react to this, all I can say is they deserve the contempt which the Executive Office has for them.

We will pass on, as most of the world has passed on, to a totalitarian system. I don't expect that and if there is anything I can do to prevent it, I shall insofar as I am capable.

With those introductory remarks, if the Senator would like, I will proceed with my prepared statement.

Senator MUSKIE. Yes, I think we should, and I think we ought to use this coverage as a chance to get our point across.

Senator FULBRIGHT. It was very hard to restrain myself this morning——

Senator MUSKIE. I obviously recognized it.

Senator FULBRIGHT [continuing]. When the Attorney General was making some of those statements.

He just dismisses the Congress as an effective body. He doesn't seem to accept the idea that the Congress can pass a law and make many of the things he says the executive branch does illegal. It doesn't seem to dawn on him we can pass laws without Presidential approval.

What, in effect, the Attorney General is saying to us is that you are all a bunch of boobs and you don't know how to use the power given you and therefore the executive is going to take it over. That is what it comes down to.



Obviously, the Congress has the constitutional power, and if they have the sense and wit to use it, we can pass a law negating everything he said this morning. It takes two-thirds over a veto, but that, nevertheless, would be final. There is nothing the President can do other than impound it and ignore it.

I suppose, in the long run, if the Army will obey his commands, it is just like any other dictatorship, he can thumb his nose at the Congress, if you want to come down to that.

But, Mr. Chairman, I would proceed with my formal statement.

On April 22, 1948, Congressman Richard Nixon of California, engaged at that time in an investigation of alleged subversive activity, berated the Truman administration for its uncooperative attitude. He commented as follows:

The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making that decision.

I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason; that would mean that the President could have arbitrarily issued an executive order in the Meyers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.—Congressional Record, April 22, 1948, Page 4783.

#### I. EXECUTIVE PRIVILEGE: THE "NIXON DOCTRINE"

Mr. Nixon's views on executive privilege have changed since his days as a congressional investigator. Changes of outlook are not unknown among legislators who become Presidents—that trip down Pennsylvania Avenue seems to work magical transformations. But in Mr. Nixon's case the metamorphosis could hardly have been more complete. Soon after coming to the White House he declared his policy on executive privilege. In a memorandum on the subject addressed to the heads of executive departments and agencies on March 24, 1969, President Nixon purported to limit the use of "executive privilege," but at the same time he claimed a right for the Executive to withhold information from Congress when disclosure "would be incompatible with the public interest"—the Executive being the sole judge of what was or was not in the "public interest."

The Nixon doctrine on executive privilege was amplified on March 12, 1973, on which occasion the President proclaimed the doctrine to be "rooted in the Constitution." The President did not provide any clues as to where in the Constitution the doctrine of executive privilege might be rooted as might have been expected of a "strict constructionist." But he did give his personal promise that executive privilege would not be used to conceal "embarrassing information" but only when disclosure would harm the "public interest." Once again, it is clear, the Executive would be the sole judge of what was or was not in the "public interest," as well as of what might constitute "embarrassing information." The President went on in his statement to extend the mantle of executive privilege beyond himself and his burgeoning White House staff to cover Cabinet and other officials who simultaneously hold White House positions and also former White House officials. The latter proscription would seem to imply, in the case of a crucial figure like Henry Kissinger, that even when the Vietnam war

and his own role in ending it have become history, Mr. Kissinger will still be immune—perhaps even prohibited—from discussing these matters with congressional committees. As the President put it, staff members must be free from any fear that their advice “will ever become a matter of public debate.”

In his press conference, of March 15, 1973, Mr. Nixon seemed disinclined to discuss any “embarrassing information” relating to the Watergate scandal, but he expressed the most forthright views on executive secrecy—views quite strikingly at variance with those he had held 25 years before, and in some respects, it would appear, even 1 year before. “Members of the White House staff,” he said, “will not appear before a committee of Congress in any formal session.” This sounds awfully close to a claim of blanket immunity, although less than a year ago, in a letter to Dr. Jeremy Stone, director of the Federation of American Scientists, the President’s Counsel, John W. Dean III, disclaimed such immunity in these words: “You asked whether President Nixon or any former Presidents have ever asserted a claim that Presidential aides have blanket immunity from testifying before Congress on any subject. I am not aware of any public statement by President Nixon or any past President to this effect.”

I submit, Mr. Chairman, that that seems to be directly contrary to what the Attorney General said this morning.

“We will furnish information under the proper circumstances,” Mr. Nixon promised on March 15. “We will consider each matter on a case-by-case basis.” In that press conference as in his formal statement of March 12, Mr. Nixon left no doubt that it was the President, and the President alone, who would decide what the “proper circumstances” were for granting or withholding information. It was all, in the President’s view, a matter of upholding the principle of the separation of powers, and if the Senate wished to attack that great principle, he would gladly meet them in court.

Here is a novel doctrine indeed: In the name of separation of powers Mr. Nixon claims for the executive an absolute, unlimited power to decide what will be made known to Congress and the country and what will be kept secret. Where does the separation come in? The President had nothing to say about that on March 15, but he did suggest an odd and interesting distinction between the kind of issue Congress might legitimately investigate and the kind it might not.

Congress, in Mr. Nixon’s view, was on much stronger ground in asking the Government—I believe he meant the executive branch of the Government—to cooperate in an investigation of espionage against the Government—such perhaps as those once conducted by the House Committee on Un-American Activities—than in an investigation of political espionage such as the Watergate affair.

Can Mr. Nixon have meant this? Would he really exempt the subversion of the electoral process from the legitimate area of Congressional inquiry and executive accountability? To be charitable, one must assume that the President has not thought the matter through. Nonetheless, his press conference of March 15, and his statement of March 12 on executive privilege, assert an unprecedented, sweeping claim to absolute Presidential discretion in deciding what will and will not be kept secret from Congress and the country.



The statement of March 12 is filled with vague pieties about compliance with "reasonable requests" for testimony or documents and the ready provision of "necessary and relevant" information. We can all applaud the commitment to "reasonableness," "necessity," and "relevance," but these are not objective categories. As has already been amply demonstrated, the executive and Senators may differ widely on what these principles require in such matters as the Gray nomination and the Watergate investigation. The real question of course is who is to decide what is "reasonable," "necessary" or "relevant." The President contends that he should decide, case-by-case and on the basis of his own judgment and convenience. That is not a defense of the separation of powers, but the antithesis of it; it is a claim to exclusive and arbitrary power. The alternate approach—and the only approach consistent with the separation of powers—is to divide the power of deciding what information will be withheld from Congress and what will be provided. The purpose of the legislation which I commend to the combined subcommittees today is not to eliminate the practice known as executive privilege but to remove it from the realm of executive caprice, to define and restrict it by law.

## II. THE ROOTS OF PRIVILEGE

"Privilege" is the right word for unrestricted executive secrecy, because there is no basis in law or history for the claim of any right to withhold information from the people's elected representatives. A review of past usage and precedent shows that "executive privilege" is not a legal or constitutional principle but simply a custom, a survival of the royalist principle that "the King can do no wrong." Legal scholars regard the claim to an absolute executive discretion in matters of providing or withholding information as an anachronistic survival of monarchical privilege, an extension from King to President of the doctrine of sovereign immunity. As currently invoked and practiced in our country, executive privilege represents a gap in the rule of law, placing the executive branch of our Federal Government in a position of immunity from principles of law which are binding upon other branches of government and upon ordinary people.

In the view of Prof. Raoul Berger, who has made an exhaustive study of the origins of executive privilege, there is "little if any historical warrant \* \* \* for the notion that executive privilege was ever intended to be among the checks on the legislative power of inquiry."—(Raoul Berger, "*Executive Privilege v. Congressional Inquiry*," part I, UCLA Law Review, May 1965, page 1044.<sup>1</sup>) That, however, and more, are exactly what recent American administrations have claimed. Reading into the past a greatly revised, if not wholly new, conception of the intent of the Constitution, recent administrations have contended that their discretion to withhold information is absolute, plenary and immune from either congressional restriction or judicial review. In the Justice Department's memorandum of 1958, Attorney General William Rogers went so far as to contend that "Congress cannot, under the Constitution, compel heads of departments by law to give up papers and information, regardless of the public interest involved; and the President is the judge of that interest." The memorandum goes on to assert that the withholding of information is a

<sup>1</sup> See Appendix, Volume III of these hearings, Executive Privilege, Part 1, Law Review Articles and Statements of Legal Scholars.

political rather than a legal matter, and that neither Congress nor the courts may compel the President to provide information when in his own judgment, it would be "inexpedient" to do so.—"The Power of the President to Withhold Information From the Congress"—memorandum of the Attorney General, compiled by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 85th Congress, 2d session, pp. 3-4.

This, of course, is a repudiation of the very concept of a government of checks and balances. If the President has sole discretion to keep information from Congress and the country, he is in practice at liberty to do anything he wishes, at home or abroad, as long as he manages to keep it secret.

The evil in its modern form was born of honorable intent, the desire of the Eisenhower administration to protect its officials from the attacks of Senator Joe McCarthy. The cure, however, has proven to be as deadly as the disease, as executive privilege, both formally and informally invoked, has ripened into a highly effective means of nullifying the investigatory function of Congress. In neither logic, law, nor practice can there exist simultaneously an effective power of legislative oversight and an absolute executive discretion to withhold information. Inevitably, one must give way to the other; the only question is which one is to be dispensed with.

In foreign as in domestic affairs there can be no question of the authority—indeed of the responsibility—of the Congress to exercise legislative oversight. This power is spelled out in section 136 of the Legislative Reorganization Act, which states that each standing committee "shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government." The power and duty of legislative oversight are in fact rooted deeply in our constitutional history. In the words of a study of the congressional power of investigation prepared for the Senate Judiciary Committee in February of 1954: "A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin. Its roots lie deep in the British Parliament, and only in the light of a knowledge of these origins and subsequent developments does it become possible to comprehend its limits."—"Congressional Power of Investigation," study prepared at the request of Senator William Langer, chairman of the Committee on the Judiciary, by the Legislative Reference Service of the Library of Congress, U.S. Senate, 83d Congress, 2d Session [Washington: U.S. Government Printing Office, 1954], p. 23.

The same general proposition was endorsed by the Supreme Court in *McGrain v. Daugherty* in 1927, in which the Court stated that, "The power of inquiry—with power to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified."

Legislative inquiry and oversight are of course impossible without pertinent information. Insofar as the Executive is at liberty to with-



hold information, he is also at liberty to nullify the ability of Congress to exercise legislative oversight. To state the matter in its simplest terms: If Congress does not have the information it considers necessary, it cannot effectively investigate the executive; and if Congress does not investigate the executive, there is no one to do it but the executive itself. Quite understandably, any administration must find it comfortable and convenient to serve as its own judge and jury, but such an arrangement is anathema to our constitutional system of separated powers checked and balanced against each other.

The principle of executive accountability to Congress was asserted from the outset of our history. In 1789 Congress adopted, and President Washington signed, a statute stating that it "shall be the duty of the Secretary of the Treasury \* \* \* to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office \* \* \*." In the congressional debate on this measure, Roger Sherman observed that, "as we want information to act upon, we must procure it where it is to be had, consequently we must get it out of this officer, and the best way of doing so must be by making it his duty to bring it forward."—Raoul Berger, *Executive Privilege v. Congressional Inquiry*, part I, UCLA Law Review, May 1965, p. 1061.

The omission of similar requirements to provide information from the act establishing the Department of State—or the "Department of Foreign Affairs" as it was first called—was interpreted by Attorney General Rogers in 1958 as proof that "the founders of our Government, and those who sat in the First Congress, meant to give no power to the Congress to see secret data in the executive departments against the wishes of the President."—*Ibid.*, p. 1063.—In fact, Professor Berger points out, the congressional debate about the proposed "Department of Foreign Affairs" contained not a single word about the congressional right to require information, secret or otherwise, and from this "the Attorney General might with equal plausibility have concluded that the right to require information had gone by default."—*Ibid.*, p. 1063.—In complete contrast with the Rogers claim of unlimited executive license from secrecy, an earlier Attorney General, Cushing, advised President Pierce in 1854 that, "By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General."—*Ibid.*, p. 1064.

In the tradition of the Treasury Act of 1789 many other requirements of information have been enacted into law over the years. Section 313 of the act of 1921 establishing the General Accounting Office directs every agency of the Government to furnish to the Comptroller General "such information regarding the powers, duties, activities, organization, financial transactions, and methods of business and their respective offices as he may from time to time require of them." The language of the statute is clear: it refers to such information as the Comptroller General may "require," not to such information as the Comptroller General may desire and the agency involved choose to provide. Indeed, in 1925 President Coolidge's Attorney General

acknowledged that the papers to which the Comptroller General was entitled, under the act of 1921, "Would seem to be a matter solely for his determination."—*Ibid.*, page 1112.

In the name of executive privilege—or, more vaguely, of the "public interest"—agency heads have taken the extraordinary position that they are at liberty to ignore this provision of law. To cite one striking example: In 1969 the General Accounting Office was asked by the Foreign Relations Committee to conduct a review of the training of foreign military personnel under the military assistance program. For purposes of this study the General Accounting Office thereupon requested of the Department of Defense copies of its 5-year plan for military assistance, performance evaluation reports on Korea and possibly other countries, and a Defense Department staff report on the status of foreign military training systems. All were refused, the 5-year plan on the ground that it was only a "tentative planning document," the Korean report on the ground that it was "not available at the present time," the status reports on the ground that they contained the "opinions" of American military advisers the release of which might provide "adverse reactions" on the part of the foreign governments concerned. (Letter from Secretary of Defense Laird to Senator Fulbright, June 26, 1969.) The General Accounting Office submitted its report on the military assistance training program in early 1971 but was unable to comply fully with the Foreign Relations Committee's request, pointing out that officials of both the State Department and the Department of Defense had "withheld or delayed the release of Military Assistance Program reports and records essential to a full and complete review. . . ." The denial of access to records, the General Accounting Office report pointed out, was not a new problem but "a continuation of similar problems the General Accounting Office has encountered over the years in reviewing Department of Defense programs, particularly evaluations of the military assistance programs." (General Accounting Office Report to the Committee on Foreign Relations, "Problems in the Administration of the Military Assistance Training Program," p. 94.)

To cite another more recent example: General Accounting Office officials told the House Subcommittee on Government Information last week, on April 3, that White House counsel John D. Dean, III, had invoked executive privilege to thwart an inquiry into tax-paid flights by administration officials during last fall's campaign and the extent, if any, to which the Government had been reimbursed by the Committee to Re-elect the President for any purely political travel. The Comptroller General's request for access to passenger lists and flight logs went unanswered until after the election. On behalf of Mr. Halderman, to whom the inquiry had been addressed, Mr. Dean replied on November 22 that the passenger lists and flight logs were "personal to the President and thus not the proper subject of congressional inquiry." Once again one recalls Mr. Nixon's pledge that "executive privilege will not be used as a shield to prevent embarrassing information from being made available. . . ." Can the revelation of possible use of public funds for the President's reelection campaign possibly be harmful to the "public interest" or, as seems evident, is it the administration's political interests that are being defended? I do not suggest at this point that the administration used public funds for



campaign purposes—one does not know whether they did or not—but I do suggest, most emphatically, that the question of whether they did so is indeed a proper subject of public inquiry, and surely is not a matter which is “personal to the President.”

These are only two of many instances of the executive branch withholding information from the General Accounting Office in defiance of the law. Executive privilege, Professor Berger recalls, was originally justified as a means of assisting the executive to “take care that the laws be faithfully executed,” and he comments: “It is a feat of splendid illogic to wring from a duty faithfully to execute the laws a power to defy them. \* \* \*” (Berger, *Ibid.*, p. 1114.) Professor Berger goes on to cite a Supreme Court pronouncement of 1838: “To contend that the obligation imposed upon the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.” (*Kendall v. United States.*)

If the matter of executive accountability to Congress were to be brought to a final test—as President Nixon has challenged the Senate to allow—there seems little doubt of the legal authority of Congress, or of a congressional committee, to subpoena documents and Government officials, just as it can subpoena private individuals to appear and give testimony, and to hold an individual in contempt should he fail to comply. Under section 134a of the Legislative Reorganization Act of 1946, every standing committee and subcommittee of the Senate is authorized “to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures . . . as it deems advisable.”

In his authoritative book, “The President, Office, and Powers,” Prof. Edward Corwin writes: “\* \* \* should a congressional investigating committee issue a subpoena duces tecum to a Cabinet officer ordering him to appear with certain adequately specified documents and should he fail to do so, I see no reason why he might not be proceeded against for contempt of the House which sponsored the inquiry.” (Edward S. Corwin, “The President, Office, and Powers” (New York University Press: 1957), pp. 281–282.)

Although the issue is largely untested and in need of legislative clarification, authorities agree that Congress is not without resources to require the disclosure of pertinent information and the appearance of appropriate witnesses. A study of “Congressional Inquiry Into Military Affairs” prepared for the Foreign Relations Committee in 1968 by the Library of Congress points out that contempt of Congress by reason of the failure of a witness to testify or produce papers is punishable by law as a misdemeanor. Furthermore, there is no necessity for Congress or a congressional committee to rely on the Department of Justice to act in a contempt case. As an agent of the executive, the Attorney General might be less than wholehearted in the prosecution of a recalcitrant witness. But, as the military affairs study points out, “There can be no doubt that either House of Congress has the power to seize a recalcitrant witness, try him before the bar of the House, and punish him for contempt by imprisoning him in the Capitol.”—Congressional Inquiry into Military Affairs, a study prepared at the request of the Committee on Foreign Relations, U.S.

Senate, 90th Congress, 2d session (Washington: U.S. Government Printing Office, 1968), p. 7. Pertinent rulings were made by the Supreme Court in *Jurney v. MacCracken* (1935) and *McGrain v. Daugherty* (1927).—One legal authority has asserted that Congress undoubtedly has power to punish contempts without invoking the aid of the executive and the judiciary, by the simple forthright process of causing the Sergeant at Arms to seize the offender and clap him in the common jail of the District of Columbia or the guardroom of the Capitol Police.—Joseph W. Bishop, Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 *Yale Law Journal* 477 (1957), p. 484.—This view has recently received the added, authoritative endorsement of the senior Senator from North Carolina.

These, Mr. Chairman, are some of the broad historical and constitutional considerations underlying the legislation which I commend to you today. Before summarizing the provisions of my bill, I would like to cite certain current and specific instances in which the Foreign Relations Committee has been hampered in the performance of its legislative duties by executive secrecy and recalcitrance in matters under the committee's jurisdiction.

### III. EXECUTIVE PRIVILEGE AND FOREIGN POLICY

When we speak of "executive privilege," I reiterate, it should be understood that we are not referring simply to those relatively infrequent instances when the President formally invokes that dubious doctrine.

I believe the Attorney General said this morning they invoked it four times.

Well, that is really not the issue.

Far more frequently executive branch officials employ tactics of delay and evasion which permit the executive to exercise executive privilege without actually invoking it and without honoring the commitment of three Presidents that only the President would invoke executive privilege. As matters now stand, that commitment has been reduced to a meaningless technicality; only the President may invoke executive privilege but just about any of his subordinates may exercise it—they withhold information as they see fit but they do not employ the forbidden words.

At the same time that the executive has made increasing use of executive privilege in this broader, more meaningful sense of withholding information by a variety of devices, more informal than formal, Congress has become increasingly alert to the implications of executive secrecy. Without information, it is now increasingly recognized, Congress is scarcely able to investigate or oversee the execution of its laws, and if it cannot engage in these functions, it is scarcely qualified to make the laws at all.

In cooperation with the extremely useful survey being conducted by the Subcommittee on the Separation of Powers, the staff of the Foreign Relations Committee have reviewed the committee's records in order to ascertain instances in which the Executive has refused to provide requested information or to make witnesses available. In carrying out this assignment the staff soon discovered that the compilation of a complete list would occupy them for an indefinite period.



And, as I pointed out in my letter to the Senator from North Carolina covering the completed survey forms, many of the Foreign Relations Committee's difficulties in obtaining information from the executive branch have fallen outside the scope of questions posed by the subcommittee's survey. On many occasions we have encountered not outright refusals to provide information or to make witnesses available but indefinite delays, evasion, obfuscation, unresponsive answers, reluctance to tell the whole truth, and lack of candor.

On one occasion, for instance, former Ambassador to Laos, William Sullivan, now Deputy Assistant Secretary of State for East Asian Affairs, was asked why at an earlier hearing he had withheld information about the critical role the U.S. Air Force was playing in northern Laos, far away from the Vietnamese infiltration routes along the Ho Chi Minh Trail. He replied, disingenuously, that he had not been asked any direct questions about U.S. air operations in northern Laos. My own comment at the time was that "There is no way for us to ask you questions about things we don't know you are doing." I might say in that instance we asked him about everything else but no one ever dreamed of this, so it never occurred to anyone.

By way of illustration, here are a few representative examples of Foreign Relations Committee requests for information and executive branch responses, drawn from the survey forms submitted to the Subcommittee on Separation of Powers:

On February 8, 1972, the committee requested a State Department report on world oil supplies, which, according to a press account, suggested that in the near future the United States would need to import greatly increased quantities of oil. This was refused by the Assistant Secretary of State for Congressional Relations, Mr. Abshire, on the ground that "The paper is a preliminary working draft that is being used internally for discussions with other agencies with interests in the energy field."

On February 25, 1972, I asked Secretary Rogers to provide the committee with certain evaluative studies of Radio Free Europe and Radio Liberty. Some were provided, but others were withheld on the ground that they were "inappropriate for disclosure, particularly as they are work products of the National Security Council System."

On January 18, 1973, the State Department was asked to provide a copy of a plan for U.S. assistance to a 5-year modernization program for the Korean Armed Forces. The committee wished to have this information for use in its consideration of military aid legislation which was before the committee. No response has been received concerning the plan although some information was provided regarding the United States-Korean agreement.

On July 14, 1971, we requested a copy of the annual State Defense memorandum on military assistance and sales, described by the State Department as "The basic military assistance policy guidance for all agencies." Mr. Abshire replied after 2 months, "As you know, the President has directed that internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved executive branch positions should not be made available to the Congress."

I, in turn, replied as follows: "I fail to understand how the Department can allege that a document which contains the 'policy guid-

ance for all agencies' concerned with the military assistance and sales programs does not constitute 'approved executive branch positions.' I want the record to show that the committee does not accept the Department's rationale for refusing to furnish the document."

On September 29, 1969, the Department of Defense was asked to provide the Foreign Relations Committee with information regarding internal defense plans for foreign governments prepared by the United States. This request was refused in a reply received 3 months later which stated that the plans in question were "viewed as tentative planning documents the release of which outside the executive branch would risk adverse reactions by the governments concerned."

You will note these replies usually go 2, 3, 4, 5 months.

I have outstanding now a letter to the State Department, asking the Secretary to give us some guidance as to what justification they have for bombing Cambodia. I think that is 2 or 3 weeks outstanding, and I suppose I will get an answer next summer when the matter is resolved.

On March 14, 1972, the Secretary of Defense was asked to provide a Pentagon study, referred to in the press, relating to the capacity of the Chinese Nationalist Government on Taiwan to defend itself against amphibious assault from the mainland.

After almost a year, the Defense Department replied, on January 24, 1973, that it had located a document "which in some ways resembles" the document requested, but the Department refused to make it available on the ground that "Since the document is an internal working level paper prepared some years ago and has never received any approval or implementation in the Department, its use would serve no purpose."

On three separate occasions, between December 1969 and January 1971, I asked the State Department to make available reports by an Englishman, Sir Robert Thompson, on Vietnam, to which the President had made reference in a television speech. On February 3, 1971, Mr. Abshire replied that the State Department was "actively working" on my request. On February 12, 1971, the request was finally declined on the ground that Sir Robert Thompson's reports had been "prepared for the President personally."

On March 1, 1972, I asked the United States Information Agency to reconsider an earlier refusal to provide the Foreign Relations Committee with its country program memorandums, described by USIA itself in its own bulletins as designed to integrate "USIS planning and resource allocation with overall U.S. objectives in the country." This request was refused in a formal Presidential invocation of executive privilege.

I think, if I may interject, the reason why they finally invoked formal executive privilege is because the committee had the approval to cut the appropriation \$45 million. That is the only thing that has had any effect.

Senator MUSKIE. You ought to try that more often.

Senator FULBRIGHT. I have already referred to the Defense Department's refusal of access to its 5-year military assistance program to the General Accounting Office. Between May 1969 and August 1971, the Foreign Relations Committee made numerous requests for this document in order to allow it to appraise the administration's annual



military assistance request in the context of its long-range planning. At one point in the protracted communications, on August 5, 1971, Secretary Laird denied the existence of a 5-year plan, although he himself had made reference to it in previous correspondence. At last, on August 30, 1971, President Nixon refused the information in a formal invocation of executive privilege.

I turn now, Mr. Chairman, to representative examples of individual refusals to testify before the Foreign Relations Committee:

On February 2, 1971, Mr. John F. Lehman, Jr., a National Security Council staff member was invited to meet with the committee to amplify certain remarks he had made at a meeting with Senate staff members and Foreign Service officers, remarks reported in the press to have been disparaging of the Foreign Relations Committee and its chairman. Mr. Lehman refused to appear because of his position on the National Security Council staff. There was no allegation it concerned Mr. Lehman and the President. He was clearly a member of the staff of the NSC.

The Foreign Relations Committee has accumulated voluminous files documenting the refusals of Mr. Kissinger to testify in either open or closed session. All invitations have been refused, although Mr. Kissinger has graciously consented on a few occasions to meet with members of the committee in private homes, restaurants, or Capitol hideaways. I will not take up the subcommittees' time with a detailed recitation of these refusals. I note only that in the case of officials who are considered personal assistants to the President—such as Mr. Kissinger, Mr. Haldeman, Mr. Ehrlichman, Mr. Dean, and their staffs—as distinguished from department heads—such as the Secretary of State—the claim of “executive privilege” is extended beyond the withholding of information to the withholding of the person himself, to his refusal even to appear before a congressional committee, either in public or in closed session. The Secretary of State—the present one like his predecessor—has repeatedly refused invitations from the Senate Foreign Relations Committee to testify in public, but he has usually acceded to invitations to testify in closed session. On these occasions the Secretary of State has all too often withheld information from the committee, but at least he has withheld it in person, giving Senators the opportunity to make their own views known and also to see if they can gauge the intentions of the administration by listening to the Secretary's tone, so to speak, as well as his words. This procedure is by no means satisfactory, although it is obviously preferable to the refusal of White House officials to testify at all.

I do not consider Mr. Kissinger's influence, or that of his new foreign policy bureau in the White House, as being in any way sinister, illegitimate, or even inappropriate—except in one respect: their immunity from accountability to Congress and the country behind a barricade of executive privilege. The President is entitled, within the limits of the law, to organize his advisers and delegate authority among them as he sees fit. He is not, however, at liberty to create—nor is Congress at liberty to accept—a policymaking system which undercuts congressional oversight and the advisory role of the Senate in the making of foreign policy. Were the President disposed to dismantle the elaborate National Security Council staff, divest Mr. Kissinger of his active negotiating role, and retain his services as a personal ad-

viser. I would see no reason to challenge the invocation of executive privilege on Mr. Kissinger's behalf. That, however, is not the case, nor does such an arrangement seem likely to commend itself to the present administration.

As matters stand, Mr. Kissinger appears on television shows, provides "background" briefings for invited members of the press—who are permitted to ask questions—and on a few occasions has asked the leadership to provide special facilities so that he can provide briefings to selected Senators under his own rules. At the same time Mr. Kissinger and members of his staff have steadfastly refused to appear before any congressional committees as such either in public or executive session. The result is that the people's representatives in Congress are denied direct access not only to the President himself but to the individual who is the President's chief foreign policy adviser.

Until and unless legislation is adopted by Congress to restrict executive privilege both as it applies to information and as it has been extended to shield individuals in high policy positions, the Executive will continue to be the sole judge of that amorphous category called the "public interest" and of what is compatible or incompatible with it. It will still retain the power to decide for itself whether and to what extent it will be investigated. It will still be the judge and jury in cases of its own malfeasance and failures of judgment.

#### IV. LEGISLATIVE REMEDY

With a view to breaching the barricades of executive secrecy, I have resubmitted, in altered form, the "executive privilege" bill which I first introduced on March 5, 1971 [S. 1125]. Taking account of the increasing abuse of executive privilege—in its broader sense—and of the growing disposition of Congress to deal with it, I have strengthened my bill by adding to it the recent proposal of the Senator from Mississippi [Mr. Stennis] and the Senator from Wisconsin [Mr. Nelson]. My bill, as originally formulated, would require employees of the executive branch to appear in person before Congress or appropriate congressional committees when they are duly summoned, even if, upon their arrival, they do nothing more than invoke executive privilege. One purpose of this bill is to eliminate the unwarranted extension of the claim of executive privilege from information to persons. It would require an official such as the President's assistant on national security affairs to appear before an appropriate congressional committee if only for the purpose of stating, in effect: "I have been instructed in writing by the President to invoke executive privilege and here is why \* \* \*."

Going beyond the requirement that executive officials appear when summoned, the Stennis-Nelson proposal would charge the congressional committee concerned with the responsibility of deciding whether or not a witness' plea of executive privilege were "well taken." If not well taken, the witness would be required to provide the information requested. Further, when any committee upholds or denies an invocation of executive privilege, it would then be expected to submit an explanatory report and resolution to the entire Senate—or House—which would then have the responsibility of taking appropriate action. This extremely desirable provision, already approved by the Demo-



cratic Policy Committee and Caucus, would place the final responsibility for judging the validity of a claim of executive privilege in the Congress, where it belongs.

My bill goes on to lay down specific guidelines for the invocation of executive privilege by the executive. First, and perhaps most important, the principle would be established that information could be withheld from Congress only on the basis of a formal invocation of executive privilege, in effect eliminating the all-too-common executive practice of withholding information on vague and insubstantial grounds, such as the contention that a document is purely a "planning" document, or that it would be "inappropriate" or "contrary to the national interest" to disseminate it more widely.

In addition, the bill would write into law the personal commitment made by each of the last three Presidents that executive privilege will be invoked only on the specific order of the President, only, in the language of my bill, "if the President signs a statement invoking such privilege with respect to that information requested." The bill further spells out procedures through which within a limited time period, agency heads judging there to be compelling circumstances for the withholding of requested information from Congress, a congressional committee, or the General Accounting Office, would be required to gain the assent first of the Attorney General and then of the President, before executive privilege could be invoked. Should the Attorney General fail to agree with the agency head on the need of secrecy, or should the President decline to invoke executive privilege, the requested information would be made available immediately.

Finally, the bill provides that, if within 30 days the executive has neither provided the requested information nor invoked executive privilege, funds will be cut off from the agency concerned until either the information is provided or executive privilege formally invoked.

Secrecy and subterfuge are themselves more dangerous to democracy than the practices they conceal. Totalitarian devices such as military surveillance of civilians, the infiltration and sabotage of a political opposition, and efforts to intimidate the news media cannot long survive in the full light of publicity. An ill-conceived war, once recognized as such by the people and their representatives, must eventually be brought to an end. But without publicity and debate there is no redress. Secrecy not only perpetuates mistaken policies; it is the indispensable condition for their perpetuation. In the words of the great early American legislator Edward Livingston of New York:

No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses, which were imperceptible, only because the means of publicity had not been secured.

Quoted by Raoul Berger in *Executive Privilege v. Congressional Inquiry*, UCLA Law Review, May 1965, p. 1332.

The bill concerning executive privilege which I commend to the combined subcommittees today is designed to help secure the "means of publicity" of which Livingston spoke and, in so doing, to help restore the Congress to its proper role as the guardian of democratic liberties. The purpose of this bill is not to eliminate but to restrict the practice of executive privilege, by reducing it to bounds in which

it will cease to interfere with the people's right to know and the Congress' duty to investigate and oversee the execution of the laws.

Thank you very much, Mr. Chairman.

Senator MUSKIE. Thank you very much, Senator Fulbright.

Before I overlook it, Senator Kennedy wanted me to convey to you his apologies for not being present this afternoon. He is presiding over another meeting which he could not avoid.

He wanted me to ask this question in his behalf:

Have you ever attempted to subpoena information or witnesses for the Foreign Relations Committee and do you think that use of formal process is an appropriate or desirable way to bring the abuse of executive withholding of information in control?

This approach is touched upon quite extensively by Mr. Clifford this morning. He suggested that maybe the time had come, using the Watergate case, now, to use the subpoena power and to proceed through the courts.

Senator Kennedy's question is whether you have ever tried to subpoena a witness and whether——

Senator FULBRIGHT. We have subpoenaed private witnesses.

This matter came up, I remember very, very, very clearly when I was chairman of the subcommittee investigating the RFC (Reconstruction Finance Corporation) back in 1949 and 1950. It was one of the first instances and it concerned Donald Dawson, who was a close adviser in the White House of the President.

It was a close case because, if anybody, I would think communications between Dawson and the President probably were under executive privilege.

I thought about it at great length and I decided not to do it.

Strangely enough, after a few days or maybe a week's passage, the criticism of Mr. Dawson and the President apparently had some effect because Dawson finally came voluntarily.

That was the first time I considered it and we talked about it. I was advised to do it.

And I may say this to the Senator, this matter has come up on two or three occasions. I have thought about it and as Foreign Relations Committee chairman decided against getting into this kind of a long legal battle which concerns not only my committee, but the whole Senate. I am very glad that the present circumstances will insure, I believe, the attention of the whole Senate and of the public, which puts it in a different category.

I had thought, and in my own experience, because there had been such a—a kind of tension that had definitely opened between the Foreign Relations Committee and the Executive, and this is particularly relevant to the preceding administration, that there would be a great disadvantage in going off on a legal battle when the substantive issue of stopping the war was our concern.

Then came the question of whether we should try to subpoena Secretary Rusk, for example. In the beginning he came quite willingly, although after a few times he came quite reluctantly. I certainly thought about whether we should attempt to subpoena him.

The issue had been made and I concluded as a matter of my own judgment that it would not be profitable to become engaged in the legal battle over that issue, that it would probably work to the dis-



advantage of the committee and the cause with which we were concerned, which was to stop the war in Vietnam. Whether that was the right judgment or not, I don't know.

It seems much more appropriate to me that a broad issue such as this be tried as it is being tried under the Separation of Powers Subcommittee and the other proper subcommittees with jurisdiction over constitutional questions.

It would be kind of a side issue for me, engaged in foreign relations matters, to become engaged in and spearhead an effort to prove that we have the right to subpoena a member of the executive branch.

In all fairness, I think I was wise not to become the vehicle for that kind of a test, whereas, I believe this is the proper forum in which this matter should be raised.

Senator MUSKIE. Mr. Clifford raised the question that in the Water-gate case we have really rather an ideal case to test the issue.

Senator FULBRIGHT. He is exactly right.

Senator MUSKIE. And indeed the President, I think, in his last press conference indicated he would be receptive to going to the courts with this issue.

Senator FULBRIGHT. That is right, and the Attorney General this morning seemed to kind of dare you to do anything about it.

Senator MUSKIE. I thought I detected that in the way he presented it.

Senator FULBRIGHT. I was astounded in the way he suggested: Why don't you try impeachment? I never heard a member of the Cabinet suggest that before.

Senator MUSKIE. He recommended us to do that to change the Chief Justice of the Supreme Court.

Senator FULBRIGHT. I always refrain from suggesting such radical measures for various reasons:

Politically, I think it would be very disastrous.

Nothing, I hope, ever gets so far, thankfully, that we would even consider using that course.

This system will not work without due respect from each branch to the other. That will simply show the breakdown of the system.

Senator MUSKIE. The Attorney General's testimony this morning may make that course appear more clearly the only course available, because he said—I don't know if you were here for all of his testimony this morning—but he in fact said, before he was through that all 2.5 million employees at the Federal level had immunity.

Senator FULBRIGHT. That's right, blanket immunity, and not confined to any particular testimony, just the President has the right, as I understand him, to forbid any member of the executive branch.

Senator MUSKIE. If that really represents the view of this administration, then it seems to me clear that it would not concede any right on the part of the Congress to define or to establish its limits or to arrange a procedure for working out disagreements with the Congress on what the limits are or whether a particular witness should be called to testify.

In other words, his view excludes us from the process altogether.

Senator FULBRIGHT. I was amazed that he said these bills, the proposal—the first one was unconstitutional, I believe he said that he believed it was unconstitutional.

Senator MUSKIE. He said he believed the Constitution was divinely ordained. He may have a particular pipeline that is not available to us.

Senator FULBRIGHT. It was really to me a surprising statement for a man who I assume has a legal degree.

Senator MUSKIE. Referring to the survey which Senator Ervin's Subcommittee on Separation of Powers has been conducting on refusing to testify, and incidentally, because of the blanket nature of the Attorney General's definition of executive privilege, I didn't get to this point, and it seemed irrelevant, but it is true as you point out in your testimony that executive privilege is invoked very rarely by President Nixon or by his two predecessors, but they simply refuse to come, as Mr. Ash, who was jointly asked to testify this morning. He simply refused to come. He didn't say whether he was taking that position for the purpose of invoking executive privilege.

Senator Ervin's survey indicates that of 160 refusals, the privilege was asserted in only four cases, but the result is the same.

Senator FULBRIGHT. Yes. And the refusal is by implication based upon executive privilege, and if you push, they resort to it.

You feel you are wasting your time, spinning your wheels unless we have some understanding about it. That is clear as to these implications I mentioned. Very often the executive branch simply ignores the Congress. This is what I mean by disdain or contempt. They don't even answer a letter for 2 or 3 months. I have no acknowledgment, I believe, of my letter to the Secretary of 2 weeks or longer about Cambodia. They have gone sometimes as long as 6 months without answering a letter at all.

There is something in our system, the reason it has worked, as I see it, is respect between the branches.

It used to be customary to acknowledge and answer a letter in some fashion quite promptly and vice versa.

It seems now there is a deliberate attempt to sort of emphasize our inferiority, our status, an attempt to put us in our place so we don't bother them any more.

There are other significant ways, some I am familiar with, for example, USIA. This is not sensitive. It has nothing to do with CIA or anything of that kind. It is simply what the people in country "X" said would be desirable in that country. I can't think of anything more relevant to our inquiry and less sensitive to our national security, and it seems to me Mr. Shakespeare took pleasure in saying: "Go about your business." So the Foreign Relations Committee cut it. It went to the floor of the Senate. Administration backers and everybody gave up and so they restored it.

If I were the executive branch, I would say, "Look at that bunch of boobs; they won't stand up for their own position." I have the feeling that they have the greatest contempt for the possibility of the Senate standing up. They have had up to now.

I think what this subcommittee is doing, with the assistance and collaboration of two other subcommittees, may cause changes. In fact, this is about the only opportunity I can think of to reestablish congressional influence in our Government.

Senator MUSKIE. I think the only way to do it is make about as big a stink as you can about it.



Senator FULBRIGHT. That is what that has come to. They are in effect challenging you to do it.

Senator MUSKIE. The Foreign Relations Committee reported the most numerous instances of refusals.

I think you reported 30. And the nearest anyway—there is one, the Foreign Operations. Government Information; that is a House subcommittee, was seven. House Subcommittee on Legal and Monetary Affairs was seven; House Committee on Interior and Insular Affairs, 8, and yours was 30.

I suppose that simply reflects the greater sensitivity on the part of the Executive in this area.

Senator FULBRIGHT. Also the fact that during the past 6 months, the committee and its chairman have been in disagreement with the policy of the administration. In other words, there was a difference of view and it created an attitude of defiance on their part.

If you would always do whatever the executive branch wants and you are in complete agreement, they will usually send you what you want. There are committees which have never had refusals to be forthcoming because they are in complete agreement. They are advocates rather than critics or examiners.

If you agree with them and do as they say, they cooperate.

The function of Congress is to make issues and examine these issues objectively with a view to defining them and understanding them, not to just go along.

Senator MUSKIE. The Attorney General made the point this morning, and I think it is a valid point, that—well, he did not make it quite this way.

Let me make it my way: Our system of Government is unique in that we take the ultimate powers of the State and put them into three departments.

That is rather an unnatural relationship in many ways and because it is you can't blueprint all the relationships between the departments, blueprint all the ways they have to work together and with each other in a spirit of comity and between the areas in which we have seen this operate, the area of impoundment of funds and this one of executive privilege.

The Attorney General made much of the point that there has been no court decision on executive privilege in 200 years, but the reason is that there has been this spirit of comity, by and large.

Senator FULBRIGHT. That's right.

Senator MUSKIE. And this has been true also in the spending area, but what this administration has done in both areas is gone beyond the bounds of traditional comity and abuse its role in this tripartite arrangements, as I see it.

It is for that reason that I am tempted to believe we are left little recourse but to go the route of confrontation through the judiciary.

Senator FULBRIGHT. I think the Senator is right. There has been a spirit of comity and no administration has tried to push it to the extent this administration is doing, and to the extent they are inviting this conflict.

One thing that the Attorney General kept talking about this morning: While it is true that there are three divisions, it seems to me there are several things about the Constitution that very clearly indicate

that while there are three, if the comity ever breaks down, it is the legislature that is the basic power, the power to make the law.

Even the significance of impeachment, while that has never been used—I mean used on a President—it has been used on other officers. It has been attempted on a President only once.

Nevertheless, the existence of that is the ultimate power. He mentioned it and tried to say that because of the——

Senator MUSKIE. He tried to undermine it.

Senator FULBRIGHT. He undermined it. But it is really significant in the breakdown of comity, for if there is any one branch that should have the ultimate power, it is clearly the legislative.

I wondered what he would say about our passing a law, for example, in relation to the FBI. The FBI is a creature of law, it was created by law, was it not?

Supposing we passed a law about how to handle the files. We pass a law that specifically makes those files available to this committee or any other. Whether or not the President approves it, we pass it over his veto; does he maintain it is no longer the law and therefore he should no longer abide by it?

When you get to the ultimate power, when you consider it may take two-thirds in the passage of some laws, nevertheless, that's the power.

We can hear about the armed forces and talk about the Commander-in-Chief. Look at the Constitution. It says Congress has the power to make regulations.

Suppose we make regulations and we regulate not to send any troops to Vietnam. Would he say that we can't make regulations about troops?

It is true we haven't done it and the Congress hasn't done many of these things out of the spirit of comity which you mention. But the spirit of the Constitution clearly gives the power to the Congress.

Senator MUSKIE. The question I posed this morning about executive privilege, do you consider this as an immunity that covers the entire executive branch, that the Congress has no right to reduce it or shape it or modify it?

Suppose we were to enact your bill into law, or the Ervin bill, and it would go to the President; would he even choose to veto it, wouldn't he say he is just going to ignore it, because we have no right, according to the Attorney General's testimony this morning, to trespass.

Wouldn't you say I am not going to veto, I am simply going to ignore it because you have no right; isn't that a logical extension of his argument?

Senator FULBRIGHT. Yes, it looks that way.

It is a curious turn they have taken.

Take this matter of impoundment. I saw a television program Sunday with Mr. Butz and Mr. Lynn and Mr. Weinberger. It struck me there they are either under a great misapprehension or it was misinterpreted. It was like executive privilege.

None of us claim they shouldn't save money or hold back money if there were compelling need or justification for it in the immediate circumstances. But they confuse, at least in the way they presented it, that that issue was simply nullifying a whole program. We don't approve of that program, therefore we won't put it into effect at all.

They are two quite different things, completely different things.



It is somewhat similar to this distinction here. We don't say there should be no executive privilege. I don't admit that I can find it in the Constitution. It is part of the comity you were talking about, in order to make this relationship work and for each side to have what used to be called a gentleman's respect for the other's right, consideration for the other's right, then we accept the executive privilege as right and proper, and we don't deny it.

But to go beyond it is just as absurd and silly as in spite of the passage of an authorizing and appropriating law, the President doesn't have to abide by it.

It seems to me it clearly violates his office; he violates his oath of office in taking that attitude.

Senator MUSKIE. I thought that Mr. Ziegler's reaction to the bill the Senate passed the other day was revealing, that bill providing a procedure for impoundment that would require a ceiling which cuts as close to proportionally across the board as possible.

Mr. Ziegler's comment was it was impossible because if cuts had to be made that ought to be used to discontinue programs that he thought would be ineffective.

Senator FULBRIGHT. I don't believe any executive has ever approached this attitude on a program—of course, he has a right to veto it. But to ignore it is the same as ignoring any law to create a program. They talk about the Deficiency Act. This isn't what the Deficiency Act is at all.

I meant to mention the bill in 1789 specifically saying the Secretary of the Treasury should make information available to both Houses of Congress. People have said: "Well, why didn't they on the others?" I don't know except the money was the thing particularly in their minds at that time.

But there is no reason clearly why we couldn't, if it is considered to be proper, right and necessary, make more specific laws today. We have a law specifically in that respect on atomic energy, specifically saying that they must keep us informed at all times.

I think the proper approach would be maybe we should pass some such law as that now, perhaps with the attitude of the executive branch that that kind of law might be useful in addition to the kind of law you have here.

Senator MUSKIE. I guess the answer is if you come away with larger than a certain percentage, you don't need——

Senator FULBRIGHT. I suspect the only thing that is going to affect the President is appropriations for those programs which they back because they are still faced with a problem of the veto on any of these bills. The only place the Congress is strong enough on the distribution of powers is probably on appropriations for foreign aid and the Defense Department. There it will take only a majority.

I suspect as a practical matter, it will come down to that. The Attorney General this morning referred to that: why don't you deal with the appropriations? You have got the power to deal with the appropriations. I felt like saying, "Amen." I felt that is the only thing we can do effectively.

Assuming we all had consideration from each other, from Senators and members of the executive branch; inasmuch as that is not true to any great extent, it is going to be reduced to cutting appropriations.

What does that do? It is a way of asserting an influence that would require a spirit of compromise to be assumed.

Senator MUSKIE. I am not so sure it is indirect.

Senator FULBRIGHT. It is indirect on this particular issue. It is the only thing to make them resume what was a traditional attitude toward executive privilege, because it will be extremely difficult to pass this or any other bill over a veto. We have already experienced this—I am just speaking of practical politics—the right or wrongness is another matter.

I think it would induce the President to say to legislative leaders, well, you have finally exerted your authority and we must now, in order not to disrupt the whole Government, come to some agreement, induce a compromise agreement.

Senator MUSKIE. I think you are right.

Senator FULBRIGHT. I don't think anything less than that is going to have any real effect, especially in view of the testimony this morning.

That testimony was so extreme. I don't know how anybody in the Senate can accept that as a proper constitutional interpretation.

Senator MUSKIE. I hope the Senate takes note of it.

Senator CHILES.

Senator CHILES. Senator, some of the witnesses that are going to testify later apparently are going to express a concern that to pass the bill that you are proposing would legitimize executive privilege and give it a legal foundation and that they aren't convinced that is necessary.

They are concerned about doing that and they are going to testify after you have.

I would like to have your feelings or comments on it.

As we understand now, the term itself didn't come up until 1953, in spite of the fact it sounds like something that was used by George Washington. We are dealing with something that started in 1953.

What dangers do we run? We have the same problem in the shield law. I felt at that time that it became so ingrained and it wasn't going away, and this isn't going away, either, but this is the best way to attack it.

Senator FULBRIGHT. I think the Senator has really answered his own question.

I regret that we have to bestir ourselves in this field. You remind me that exactly the same question has arisen in the most acute way in the shield law that could affect the first amendment.

I regret we are not able to draw on the Constitution as it is written, but with these distortions being made by the Executive, what do we do about it?

As far as passing laws goes, I have the same feeling, except I don't know any alternative but to challenge this interpretation in this way.

Senator CHILES. Speaking of a challenge and the fact that such a bill would probably be vetoed, should Congress consider the fact that going on and issuing a subpoena and making an arrest, sending the sergeant at arms, if necessary, to make an arrest, and then have the test be made on habeas corpus, where it would be a direct challenge and would very quickly be in the highest court of the land?

Senator FULBRIGHT. I would think so.



I assume from what I understand, this is contemplated as a possibility in the Watergate case, on which I assume hearings will start in the next 2 or 3 weeks.

I think as often happens that the court might well be influenced by the passage of law. The courts say that is a political question: the Congress ought to take a position. In accordance with this, law might well be persuasive.

Before you came in, I said I anticipate that in the final analysis on all these issues, if we come into a deadlock with the executive, where there is no give on either side, that this question of appropriations is the one ultimate weapon short of impeachment, and the Attorney General talks about impeachment.

This is a breakdown of our system, but a real restriction, use of the appropriations power could be a solvent for this deadlock.

If we pass a law and he vetoes it, and we are unable to pass it over, if the court, and I would be extremely reluctant to say, even though four of them are administration appointees, nevertheless, would look upon this objectively enough to see the danger of accepting the kind of interpretation the Attorney General gave. I don't believe even this court would accept it. I wouldn't refrain from accepting the President's suggestion that we take it to the court.

But I don't see any reason why we shouldn't also express ourselves in some piece of legislation at the same time. It might well be of assistance to the court in making up its mind. That is referred to in some of these difficult cases, I believe, involving the *Brewster* case and also some of these publishing cases, that their decision was restricted and suggesting an edict that maybe the Congress ought to take action.

Another thing emphasizing the significance of this executive privilege: If this were the only area in which the executive has sought to limit or impose upon other parts of our democracy, but take the *Brewster* and *Gravel* cases, those are unprecedented; the Attorney General has assumed a new power to intimidate Members of the Congress.

You see, all of this is what I think is leading to the great interest in this matter that is now before you.

We had these hearings a year or two ago. It was an academic matter.

Now, not just because of this issue, but because of the growth of a lot of other issues, particularly the intimidation of the Congress through the use of the judiciary and indictment process, they are now apparently in a position to threaten to indict any member of the Senate if they wish to.

You accept it. I accept it. Everybody has accepted the Constitution, and any votes you may make might have some effect on somebody, whoever he might be, and therefore, you have *prima facie* to be influenced.

This is what the *Brewster* case come down to and the *Gravel* case exposes a Senator or Congressman to the objection of the Attorney General. We can see how objective the Attorney General is this morning.

This incarcerating the newspaper reporters, the threats against television by Mr. Whitehead; it makes quite a picture of complete Executive domination of the whole system of government. When you put that together with the world situation, where three-fourths of the peo-

ple of the world are governed by authoritarian governments, it makes a picture anybody ought to be worried about.

Look at our allies. Most of them don't have functioning legislatures. I dare say not over 25 percent have a functioning legislature. They may have one in name, but not in being, really in effect. There is plenty for people to be interested in if they are interested in the preservation of our constitutional system.

I think that is what it is focusing on. This is one of the considerations that resolves this doubt about whether we should be examining this bill or whether we should express our approval of the concept through this legislation. If we don't, then people will say we are not even interested in maintaining our own function. This is the other side of the coin. If you decline to do it, what is going to be the reaction on the part of the Executive and the public? It will be, "Well, those Senators are not interested in performing a function."

Senator CHILES. I was imposing a situation where we would take some other action which would be pretty drastic in itself.

Senator FULBRIGHT. I would think both will be called for. I anticipate conditions will warrant.

I think this is the most important thing before Congress today; reestablishing the system under which we function. It is far more important than any substantive question, far more important than any foreign aid or anything else.

This is one, and there are several others, and above all are the appropriating power, the uses of appropriation as an alternative.

Senator CHILES. That is all.

Senator MUSKIE. Thank you very much, Senator Fulbright.

This hearing will be adjourned and we will meet again tomorrow morning at 10 o'clock.

[Whereupon, at 4:05 p.m., the committee adjourned until 10 a.m., Wednesday, April 11, 1973.]



# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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WEDNESDAY, APRIL 11, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE, COMMITTEE ON THE  
JUDICIARY,

*Washington, D.C.*

The subcommittees met, pursuant to notice, at 10 a.m., in room 6202, Dirksen Senate Office Building. Senator Edmund S. Muskie presiding.

Present: Senators Muskie, Ervin, Chiles, and Gurney.

Also present: Alvin From, staff director, Alfred Friendly, Jr., counsel, and Lucinda T. Dennis, chief clerk. Subcommittee on Intergovernmental Relations: Rufus L. Edmisten, chief counsel and staff director; Alexander M. Bickel, and Arthur Miller, consultants of the Subcommittee on Separation of Powers; Tom Susman, counsel, Subcommittee on Administrative Practice and Procedure.

Senator MUSKIE. The committee will be in order. I have a brief opening statement.

## OPENING STATEMENT OF SENATOR MUSKIE

At the opening yesterday of our joint hearings on executive privilege and Government secrecy, the Attorney General gave his opinion, an unprecedented claim in my view, of the scope of Presidential power. He said in effect that the President has uncontrolled discretion to balk any congressional command for testimony or information from anyone in the executive branch of Government.

In effect what he said is that the Congress cannot effectively subpoena any of the 2½ million civilian employees of the executive branch of Government. That sort of advice to the President is what has put the Congress and the executive branch on a collision course. Such bold assertions of unlimited power for one branch of Government in its dealings with the other branches render fruitless any hope that comity or commonsense can head off a confrontation course, but that kind of advice also does much to explain the broader practice of day-to-day secrecy by the Government in its dealings with the public and the Congress. Those practices are the subject of much of the testimony we will hear today.

The President has repeatedly said he seeks to restrict secrecy, but the evidence before us would indicate that he has far to go in realizing that objective. Until secrecy is the exception and not the rule, the ability of a free people to govern itself remains in jeopardy.

I think it is highly appropriate that we should have as our first witness this morning a voice of reason and calm. Senator Stevenson. Senator Stevenson has taken an active and scholarly interest in the area of executive privilege and the necessity of a congressional response to its assertion.

I think we are fortunate indeed to begin the second day of our hearings with his testimony.

### STATEMENT OF HON. ADLAI E. STEVENSON III, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator STEVENSON. Thank you, Mr. Chairman, for your charitable comments.

Senator MUSKIE. Well, it is legislative privilege to do that.

Senator STEVENSON. I was about to say it is a privilege to appear before you this morning, but by that I do not intend a pun. The subject of executive privilege is tangled and timely and it deserves the earnest attention of Congress.

I request, Mr. Chairman, that an exhaustively researched memorandum on the doctrine of executive privilege, prepared at my request in 1971, be inserted in the record of these hearings at an appropriate point.

Senator MUSKIE. Without objection that will be done.<sup>1</sup>

Senator STEVENSON. I hope this memorandum and my testimony will help to clear away the tangle of myth and outright misrepresentation which obscures the facts about the so-called doctrine of executive privilege. It is President Nixon's extraordinary reliance on the doctrine that makes the question of executive privilege timely.

Last March 12, the President told reporters that "There were only three occasions during the first term of my administration when executive privilege was invoked anywhere in the executive branch in response to a congressional request for information."

In fact, according to the Library of Congress, the administration in its first term actually invoked executive privilege 19 times—and 4 of those claims were made by the President himself.

President Nixon seeks not only to invoke the doctrine more often than ever before; he is bidding to expand it far beyond its former meaning. He claimed recently that not only present, but former members of his staff "shall follow the well-established precedent and decline a request for formal appearance before a committee of the Congress."

And what is this "well-established precedent"?

Is "executive privilege" well-established doctrine, or ill-supported dogma? My own explorations suggest that it is a phenomenon more akin to the "Emperor's New Clothes."

My exploration into the background of the doctrine yields up numerous facts which fly in the face of the President's claims. Let me

<sup>1</sup> See p. 104.



offer the committee some of those facts, in the form of answers to three basic questions:

First, Mr. Chairman, what do the Constitution and constitutional history tell us about executive privilege?

In English and American colonial practice before the adoption of our Constitution, legislative bodies expected and received most if not all the information they requested. In the English experience, Parliament received what information it asked for. Colonial legislatures and those of the new States under the Articles of Confederation functioned as investigative as well as legislative bodies. They saw their investigative role as an important check on uncontrolled executive power—the very evil which played such a large part in the desire of the Colonies to break away from English domination.

When the Constitution was adopted, it said nothing explicit that would give the Executive an absolute right to withhold information from Congress. The Constitution assigned to Congress “all legislative powers.” It admonished that the President should “take care that the laws be faithfully executed.” Beyond that the Constitution delegated to the President only certain specific enumerated powers, which certainly did not include any power to withhold information from the legislative branch.

Neither preconstitutional history, therefore, nor the explicit language of the Constitution, can be relied on as granting the Executive any explicit power to withhold information.

What about the implicit meaning of the Constitution—the “separation of powers” doctrine implied by the differing constitutional functions of Congress and the executive?

I, Mr. Chairman, would be the last to deny the validity of this doctrine—and among the first to assert that the Executive has for some time been treading rather heavily on the powers granted to the Congress under the Constitution.

But proponents of absolute or near-absolute “executive privilege” stretch the separation doctrine too far. They interpret it to mean that Congress cannot require the Executive to produce documents and information it requests. They argue that where dispute exists, the Executive shall have wide, if not absolute, power to decide what shall be withheld and what shall be disclosed.

This is a weighty interpretation to hang on a few crypto-constitutional phrases. It is, in effect, merely a claim—a claim which has never been sustained; it finds no backing in constitutional history or the Constitution itself; it has never been ratified by statute, nor by judicial declaration.

President Nixon and Attorney General Kleindienst are, in fact, torturing the doctrine of separation of powers into a doctrine of uncontrolled power for one branch of Government—power to decide for itself what shall be disclosed and what shall be withheld. They would do well to recall the words of Madison in the 49th Federalist Paper, that none of the branches of Government “Can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”

In fact, if constitutional history and the Constitution itself point in any direction, it is toward the right of Congress to receive information from the Executive. The Constitution obliges the President “From

time to time (to) give Congress information of the state of the Union \* \* \*” Justice Story read those phrases as a clear requirement upon the President “To lay before Congress all facts and information which may assist their deliberation \* \* \*”

Second, if the Constitution provides no firm basis for the doctrine of executive privilege, what is its basis in judicial precedent and statute law?

The memorandum which accompanies my testimony disposes of this question in considerable—and convincing—detail.

Senator GURNEY. Do you have copies of that?

Senator STEVENSON. Yes; I do.

Senator GURNEY. Fine.

Senator STEVENSON. Let us simply note that the Supreme Court has never yet been confronted with a conflict between Congress and the Executive concerning executive privilege.

In fact, the cases most often cited to support a claim of executive privilege—*Boske v. Comingore* and *U.S. ex rel. Touhy v. Ragen*—do not constitute authority for the proposition that the Executive has authority—either absolute or discretionary—to withhold information from Congress. The two cases are simply not on point.

The various statutes relied upon by advocates of executive privilege do not vest uncontrolled discretion in the Executive to withhold information. They have nothing at all to do with the question of executive privilege.

In short, the legal precedents usually cited by defenders of executive privilege as foundations for their claims actually provide no such foundation.

Third, if the Constitution, the courts, and the statutes provide no firm basis for a doctrine of executive privilege, what about the precedents of history?

Proponents of executive privilege are fond of relying upon historical precedents to support their position.

In his March 12 policy statement on executive privilege, for example, President Nixon proclaimed that:

The doctrine of executive privilege is well-established. It was first invoked by President Washington, and it has been recognized and utilized by our Presidents for almost 200 years since that time \* \* \*

There are two main instances to which Mr. Nixon may be referring. In the first, in 1792, the House of Representatives requested information about the abortive St. Clair expedition. A Cabinet meeting was called to consider the request, and in the privacy of the meeting, according to Thomas Jefferson, who took the minutes, it was agreed that the Executive “\* \* \* ought to refuse those (papers) the disclosure of which would injure the public.”

But the advocates of executive privilege who cite this incident, including the Attorney General yesterday, fail to tell the whole story. In actuality, President Washington never made any public assertion of uncontrolled discretion to withhold documents; and indeed, in the instance in question, all documents were turned over to the House, including those most damaging to the Army’s reputation.

The second instance in the Washington years seems equally irrelevant. The House asked for papers relating to the Jay Treaty. Washington declined to send them on the ground that the constitutional role in the treaty-making process belonged to the Senate, not the



House. In any event, he declared, the papers had already gone to the Senate.

In neither case did Washington withhold information from Congress, and in neither instance did he invoke something which could later be called "executive privilege."

Those who cite "history" in their argument for executive privilege, it seems, have read history rather carelessly—as carelessly as they seem to have read the Constitution, judicial decisions, and the statutes.

In fact, the very phrase "executive privilege" is not rooted in history; it is a recent invention. Historians are hard put to find its use by any President or Attorney General prior to the Eisenhower administration and even within that administration the first use of the phrase may be discerned in about 1958. It seems to be a phrase created out of whole cloth to give a semantically respectable name to the withholding of information.

In 1954 Mr. Eisenhower asserted in a letter to Congress the right flatly to prohibit all executive employees from testifying or producing documents, in the interest of "efficient and effective administration \* \* \*". He was, to be sure, provoked by the persistent demagoguery of Senator Joe McCarthy, and we who are skeptics about executive privilege must face responsibly the question such demagoguery raises.

Such Executive statements, including opinions of Attorneys General, cannot be considered a basis for the validity of the doctrine; such statements constitute no more than the self-serving assertion of one's own claim in a dispute. Mr. Nixon's statement (and Mr. Kleindienst's yesterday) are but the latest in a long line of self-serving statements. They claim a great deal—but they establish nothing.

In sum, Mr. Chairman, the main body of support for executive privilege consists not in the law or history, but in mere claims by presidents and their appointees that such a privilege exists. It is, in short, a doctrine created not so much by legal or judicial deliberation, as by executive wishing, conjuring, and speechmaking.

All this, Mr. Chairman, leads me to two conclusions: The Presidential right to "executive privilege," insofar as it exists at all, is by no means so deeply rooted in law and precedent as we have been led to believe; Congress, in any case, has a broad power supported by the Constitution, by law and precedent, to obtain information from the Executive.

That congressional power exists to be exercised. Like other constitutional powers, it can hardly be said to be "absolute"; certainly whatever information Congress seeks from the Executive must somehow relate to the legislative process, whether the subject be new legislation or the President's conduct as he "faithfully executes the law." But Congress has a broad and clear power to obtain "necessary" information.

Until now there has never been an overwhelming need to define legislatively the concept of executive privilege. Even in the worst of previous confrontations, the Executive and the Congress have managed to accommodate their differences. In every confrontation since President Washington's time, the issue has been compromised—or one side has been persuaded to back off, perhaps under pressure of public opinion. George Washington, for example, can be said to have backed

off during the investigation of the St. Clair expedition; perhaps Congress backed off during the Eisenhower years.

But the situation now is changing. Confrontations in which executive privilege is invoked have been growing in frequency and intensity. During the Eisenhower administration, as we have seen, executive privilege was invoked no less than 34 times to withhold information. Perhaps in those instances the provocation was intense: President Eisenhower was struggling to resist assaults by a Senatorial demagogue in the Army-McCarthy hearings and their unhappy aftermath.

There were fewer invocations of the doctrine during the Kennedy and Johnson years, although President Kennedy did claim the privilege at least once. But with the first Nixon administration there has come a massive re-expansion of the use of the privilege—and now a bold effort by President Nixon to broaden its accepted meaning.

It is my judgment that these increasingly frequent and bitter confrontations over executive privilege make it essential that Congress act to clarify and define the doctrine.

To do so would be not only wise but constitutionally proper, for Congress is clearly commissioned by the Constitution to “make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States \* \* \*.”

Congress can choose, as a matter of policy, to legislate on executive privilege—to define the doctrine more clearly, and to specify the procedures which should govern its operation.

It is high time we did so. I say that not because I seek government by confrontation—but because I seek to avoid it. If the privilege is carefully and constitutionally defined, the confusion which now invites conflict between branches uncertain of their powers will diminish. And if the Congress by claiming its power reestablishes itself as an equal branch of the Government, such disputes will more likely be resolved reasonably and amicably between equals.

In politics as in physics, nature abhors a vacuum. In the absence of a clear and precise legal definition of executive privilege, we may expect the President to rush in with tangled and self-serving uses of it. If we ignore our power to define the concept and its proper limits, we can only blame ourselves if the Executive acts as though the privilege has no limits.

In short, Congress should define “executive privilege,” suggest when it might be used legitimately by the Executive, and provide procedural and substantive remedies should the Executive abuse the definition in any instance.

First of all, I would suggest that the preamble or policy section of such a bill should establish in the broadest terms Congress’ power to obtain information from the executive. Later on in the bill, narrower limits might be defined. But Congress should be wary of giving away any of its legitimate constitutional power. The present bills on this subject do not make sufficiently clear Congress’ broad power; they tend to sanctify a right to executive privilege, without stating clearly and forthrightly Congress’ concomitant right to obtain information.

The bill should so state that, as a general policy, the executive—to the greatest extent possible—should cooperate with Congress by



giving Congress the information it seeks. Similarly, it should also express, as policy, that Congress will not meddle unnecessarily with the executive, but will seek only information which legitimately relates to the legislative process.

Second, as in Senator Fulbright's bill and in Congressman Erlenborn's bill—and unlike Senator Ervin's resolution—no one in the executive branch should be given a blanket exemption from appearing before Congress.

Of course Congress must use discretion in calling White House members; certainly it must protect the executive against the depredations of demagogues. But blanket exemptions in the law would give too much discretion to the executive.

Third, unlike Senator Fulbright's bill—S. 828—and Senator Ervin's resolution (S.J. Res. 72), I suggest that Congress should try to define those instances in which executive privilege might properly be invoked.

It is not enough merely to allow the executive to claim the privilege and then give Congress a procedural mechanism to overcome the executive should it not agree with the President's claim. Congress—or the judiciary—may someday have to decide whether the privilege is being properly invoked; we should provide Congress and the judiciary with a clear standard by which to make those judgments.

I therefore would suggest that direct communications between the President and anyone in the executive branch should be protected—if the matters in discussion legitimately relate to aspects of public policy. Thus, if there were questions in a committee hearing about illegal activities by members of the executive branch, or questions about campaign activities not related to governmental business, this information would still be obtainable by Congress—even if the information were contained in a memo to or from the President. I can think of no reason why such information, particularly information concerning possible crimes, should be kept from an investigating Congress and hence from the public.

What about other communications within the executive branch on matters legitimately relating to public policy—communications between administration members that do not include the President, for example? First of all, a *sine qua non* to the invocation of executive privilege should be that the information is protected from disclosure under other acts such as the Freedom of Information Act or the Budget and Accounting Act. Then, where the information is so protected, the President himself should certify the right to withhold information in these cases. And this certification from the President should set out the President's reasons for withholding the information.

Fourth, we should include procedures for dealing with impasses over executive privilege.

What happens in the case of a breakdown? Suppose a committee chairman believes, despite a plausible and seemingly legitimate claim of executive privilege by the President, that his committee simply must have the requested information if Congress is to fulfill its legislative function?

In such cases, the committee chairman should submit on the floor of his House of Congress, after a majority vote of his committee, a resolution aimed at breaking the impasse. The resolution would state that it is the sense of the Senate—or House—that the information

requested is essential to the conduct of the Senate's—or House's—legislative or investigative business. If the Senate—or House—should not agree with the committee and should defeat the resolution, the matter would be ended. If it should uphold the committee, however, Congress would be acting in its clear right to obtain information as set forth in the preamble or policy section of the bill.

What happens if a witness from the executive branch refuses to present himself to Congress when called, even after service of a congressional subpoena? Or if the questions posed of a present witness by a committee are answered by a claim of executive privilege which appears to be insufficiently related to a matter of public policy? Or what happens when, even after a full-fledged floor resolution demanding information, the witness refuses to answer on a claim of executive privilege? What would be Congress' remedies?

Some, including Senator Ervin and Senator Kennedy, have suggested that Congress resort to its own remedies—the contempt power; that Congress send the Sergeant at Arms out to place the individual in custody, arraign him, and try him—or have the courts try him—for contempt of Congress.

This has never been done. And I would suggest that these remedies are unnecessarily contentious and perhaps at best futile.

Instead, I would suggest that Congress enlist the Federal courts. An order or a contempt citation from an impartial third branch would certainly lend legitimacy to the claims of Congress. And certainly no Executive is eager to disobey orders of Courts and defy what would then likely be an aroused public opinion.

I suggest that instead of starting its own contempt proceedings, the respective House of Congress could do one of two things: (1) It could appoint its own special prosecutor; or (2) Congress might delegate, perhaps to the Chief Justice of the Supreme Court, the power to appoint a prosecutor for purposes of enforcing the law. Some authority for this course appears to reside in article II, section 2 of the Constitution.

If the witness still refused after the courts ordered him to appear before Congress or to present certain information—he would then be in contempt of court. And if the witness dared the Supreme Court to enforce its order, then indeed we will have reached the ultimate breakdown of our government of laws—and the ultimate in lawlessness by the Executive.

We are dealing, Mr. Chairman, with eventualities which we hope will never occur. But they could occur—and the mere hope that they will not is no reason not to prepare for them. Indeed, such a procedure as I have outlined is intended to head off such eventualities.

In his testimony yesterday, Mr. Kleindienst expressed the hope that “mutual restraint” on both sides of this question is vital if we are to avoid disastrous confrontations over executive privilege.

I agree. But I must point out that the lack of restraint which has now inflamed the issue is not that of Congress, but of the President. He has sought to claim the privilege with unprecedented frequency and to stretch the meaning of the doctrine beyond all past understanding. He has repeatedly exceeded his own stated guidelines.

President Nixon once claimed that he would never use the privilege “as a shield to prevent embarrassing information from being made



available." He would invoke it, he said, "only in those instances in which disclosure would harm the public interest."

Yet repeatedly he has used the privilege—or threatened to use it—in ways that contradict his words: In the case of Mr. Peter Flanigan's appearance before the Judiciary Committee during the confirmation hearings of Attorney General Kleindienst; in the dismissal of A. Ernest Fitzgerald from his position in the Pentagon; in the refusal by the White House to disclose information about political flights of Presidential appointees at Government expense; and most recently in the refusal of the President to let his staff tell what they know about the growing Watergate scandal.

What, in each of these cases, was the purpose of evading testimony before Congress except to avoid embarrassment? Where, in these refusals to disclose information, is any overriding concern for the public interest?

Some time ago, Mr. Chairman, one of President Nixon's closest friends and cabinet officers, then Attorney General Mitchell, admonished critics of the administration to watch "what we do, not what we say."

Mr. Chairman, I have done so. And what I see convinces me that those who truly care about the responsible use of executive privilege, the public's right to know, and the preservation of our form of government are at this end of Pennsylvania Avenue.

Senator MUSKIE. Thank you very much, Senator, for one of the most comprehensive and thoughtful statements on executive privilege that I have had the privilege of reading or hearing as well as for your constructive suggestions for legislation. There is one problem that I think you haven't anticipated. You have anticipated a great many problems, but there is one problem that arises out of Attorney General Kleindienst's testimony yesterday—if his testimony does indeed represent the deliberately developed position of the Administration on the doctrine, and one can't always be sure of that; he seemed to be flying by the seat of his pants a great deal of the time yesterday—but if it does represent the considered policy of this administration, he seems to have said to us that executive privilege is none of our business. And if he means that, and if we should enact legislation constructed as you propose and send it to the President, I raised the question yesterday of whether the President would even dare to recognize it by vetoing it and whether he might not indeed simply ignore it on the assertion that Mr. Kleindienst made yesterday that it is none of our business.

Now that is one of the eventualities which you have expressed the hope of never reaching, but if it does arrive, would you agree the only recourse left to us would be the use of the means that have been suggested by Senator Ervin and Senator Kennedy?

Senator STEVENSON. No, sir, I'm suggesting alternative means. I'm suggesting first a statutory definition of privilege and then procedures quite different for enforcement. The present suggestions, as I understand them, are that the Sergeant at Arms be sent out to compel the attendance of a recalcitrant witness; a witness whose presence cannot be maintained in the Congress until he is purged of his recalcitrance. That does not seem to me to be a very hopeful course of action. In its starkest terms the Congress does not have any divisions to enforce its will. It has no means of physically pursuing such a course.

It has also been suggested that we exercise a power we clearly do have, the power of the purse, to retaliate against such abuses of this fictitious doctrine by simply cutting off the funds to the agency of the reluctant witness. That strikes me as an unnecessarily contentious and possibly destructive procedure. It could be destructive of the public interest.

What I am suggesting is that we define the privilege and leave it to the courts in this, as in other cases, to enforce the law, and that we seek to enlist the courts on the side of the Congress and that we in the Congress take the initiative, that we prosecute through the appointment of our own prosecutor or leave the appointment of the prosecutor to the Supreme Court, but leave it to the prosecutor to go before the court and leave it to the courts to compel the attendance of the witness. If the witness refuses to obey the courts, then he is in contempt, not of the Congress, but of the courts. At that point you might ask how many divisions do the courts have? The courts, too, have no divisions, but at that point both the Congress and the courts have aligned themselves against the President and at that point I would think that the public might very well be aligned against the President. That all being the case, it would seem to me much less likely with such procedures established that the President would in the future abuse the doctrine of executive privilege.

What I am basically suggesting is that we avoid such confrontations by defining the privilege, establishing the procedures, and by strengthening ourselves in the Congress—by making ourselves an equal branch of Government and, on the assumption that as equals such confrontations will not arise in the future and the differences can be amicably and reasonably resolved in the future as they have been in the past.

Senator MUSKIE. Well, I think the course you are suggesting would appeal to most Members of the Congress for the reasons you stated. The question I raise is this, I doubt on the basis of the testimony of Mr. Kleindienst yesterday that the President would sign such a piece of legislation because it would be inconsistent with his stated view of executive privilege.

Senator STEVENSON. Well, the Congress would have to pass the legislation over a veto, assuming that happens.

Senator MUSKIE. I suppose the possibility not of a veto but of the President deciding that the Congress has no power to enact such legislation at all and deciding just to ignore it has occurred to you. In that case would we not have reached the kind of confrontation you pose on down the line after having resorted to the courts under the procedure you stated?

Senator STEVENSON. The constitutionality of the procedures would have to be tested and the congressional definition of privilege would have to be tested in the courts. I am assuming, and on the basis of that memorandum, that the procedures and the definition are constitutional, as I have suggested.

Senator MUSKIE. Do you have any questions?

Senator ERVIN. Yes, I want to commend you for pointing out that there are no cases, there are no decisions of the Supreme Court sustaining the claim of executive privilege as set forth in the testimony of Attorney General Kleindienst yesterday, and I agree with you that the case of *Boske v. Comingore* and the *United States v. Ragen*



are not applicable at all and don't sustain any executive privilege, but I would have to take a little issue with your suggested remedies because you take, for example, the committee which has been appointed to investigate the Watergate affair. We are required under the resolution in its present form to complete that investigation by the 28th day of January 1974. A recalcitrant witness who refuses to cooperate is difficult to bring before that committee. We have been informed, and it appeared in the public press, that the President announced, before we ever subpoenaed any witness, or even determined, or even considered the question of whether we would subpoena any witness from the White House staff, that they were not going to appear.

Now I think the Supreme Court has had some constitutional decisions on this point, and in my judgment if the committee would try to obtain a witness from the White House staff under your suggestions, it would be long after February 28, 1974, before the question would ever get to the Supreme Court, because if anything has been demonstrated, it is that justice treads on leaden feet.

Now the Supreme Court has handed down decisions on the power of the Congress in this field. It says, for example, that Congress has the power and has the duty to legislate and has the power to obtain information and there is no limitation in the decisions on the source of that information which is necessary or which Congress believes is necessary to enable it to legislate with knowledge and wisdom. The Court recognizes that Congress must be able to compel the production of documents and the attendance of witnesses to obtain information in many cases, and so it says that in the absence of legislation, a congressional committee which has been authorized to conduct an investigation for legislative purposes can obtain this information; and the resolution establishing the committee investigating the Watergate undoubtedly is authorized to make the investigation. The Supreme Court has held that even where Congress fails to specify a legislative purpose in the enabling act, it is to be presumed that Congress is seeking information for legislative purposes, and the Court says Congress can issue a subpoena for a witness. The Supreme Court doesn't say Congress can subpoena anybody in the United States except White House aides or advisers to the President. It doesn't exempt them. It doesn't exempt anybody. It is inconceivable to me that White House aides or advisers have a special status of something in the nature of royalty above all other American citizens and that they are exempted from the obligations of all of the other American citizens.

The Supreme Court held in the *McGrain* case and in the *Jurney* case that a committee of Congress can issue a subpoena and if the witness fails to obey the subpoena, the committee can ask the parent body to issue a warrant for the arrest of that witness and bring him before the bar of the parent body—and in this case that would be the Senate—and that they could put the questions to him and if he refuses to answer, then they can punish him for contempt of Congress.

Now that is drastic action, but when a witness says, "I am going to stall the wheels of Congress and I am going to compel Congress to grind to a halt because I refuse to perform an obligation that is incumbent upon me as a citizen," then I think the time has come for drastic action.

We don't like the surgeon's knife, but sometimes there comes a cancer where the only way you can eradicate it is by use of the surgeon's knife, and I think you have such a thing as a cancer on the body politic that has to be eradicated the same way. And so I am frank to state, and I do not state this in the nature of a threat, but I have been given as chairman of that committee a mission to perform and, as often has been said, self-praise is half scandal and I don't know whether this is self-praise or whether it is a derogatory statement about myself, but I would like people to know that I have that quality which one's friends call firmness and one's enemies call obstinacy.

If the committee decides that any of these aides have knowledge that is pertinent to the inquiry, I am going to recommend to the committee that it take whatever action is necessary to get that testimony or to follow out the line of these decisions.

We don't need any new legislation on the subject because these decisions are already in existence. If we pass a bill and have a lawsuit about it, knowing justice travels on leaden feet, it would be about 3 years before that lawsuit reaches the Supreme Court of the United States. In all probability, if we pass the bill, the bill would be vetoed and by the bill we would put it within the power of either house of Congress to nullify by one-third plus one the capacity of the Senate to perform a function which the Supreme Court has held in the *Jurney* case and the *McGrain* case that the Senate has the full constitutional powers to perform. And so I think the legislative body ought to exercise the power necessary to enable it to discharge its own functions and not have to be depending upon the courts, which, as I said, all too often travel on leaden feet.

I cited my disagreement with your proposed remedy, but I still commend your statement as one of the most excellent statements I have seen.

Senator STEVENSON. If I might respond briefly? I don't propose to do away with any of the inherent remedies of Congress. The remedies I am proposing would be additional powers which make it easier for you and for other committees of the Congress to effectively compel the attendance of that recalcitrant witness by enlisting the courts and the contempt procedures of the courts.

Senator ERVIN. About this executive privilege of the White House, there was a case that I observed when I first came to the Senate which involved a Member of the Senate named Joe McCarthy who had quite a controversy with the Army, especially with Secretary Stevens, over who promoted Major Perez. The Members of the Senate used to get hundreds of cards from all over the country asking who promoted Perez. I participated in two investigations. The Department of Defense failed to make a disclosure of the fact that Major Perez, who was supposed to have Communist affiliations, had been promoted; had been given an automatic promotion to major one day and discharged the next day. And poor Secretary Stevens—I say “poor” although he is a man of much affluence and a very fine gentleman—he was beaten over the head by Senator McCarthy on the question of who promoted Perez. They had two investigations and nobody could find out anything about it. Then they had a change in counsel and the Defense Department and brought down former Governor Brooker of Michigan, a comparatively young man but an old-time trial lawyer—and he



recognized the fact that the worst thing that anybody in Government ever attempts to do is to try to hide something from the people and so he came down and he placed all his cards face up on the table before the committee in the third investigation, which showed there was no rascality whatever about the promotion of Major Perez. It showed under the regulations the Army keeps two records on a man in service, and one of them is his service record and the other is his security record. Normally under the regulations Major Perez was entitled to automatic promotion after a certain length of service, but his service record and security records for some strange reason met in the Department of the Army while Secretary Stevens was out in the Far East and the counsel for the Department of the Army and one of the generals up there—I believe it was General Wheeler, as I recall—found out about this Communist affiliation charge.

They had no regulations governing this, so they decided the only thing to do was to give him his automatic promotion one day and get rid of him the next day, which they did.

As soon as the cards were put face up on the table, the mystery was unraveled. I think that it would be well for the people in authority at the White House to consider that nobody ever makes a more fruitless mistake than taking a course of action which engenders in the minds of the American people, rightly or wrongly, the notion that they are trying to hide something from the American people.

Senator STEVENSON. President Eisenhower understood that. He did not hide Sherman Adams, for that matter.

Senator ERVIN. The Subcommittee on Separation of Powers has been conducting a survey and we have found out, in interrogating the congressional committees of both Houses, that since January 1 of 1964, there have been 160 separate refusals on the part of the executive branch of the Government to furnish information to congressional committees, which is a rather astounding number because all of this information is collected at the expense of the American taxpayers and supposedly for their benefit, and then to have it withheld by the executive branch from the lawmaking branch of government is, to my mind, an astounding thing.

Excuse me for my long statement. With the exception of your remedies, I commend your statement.

Senator MUSKIE. Senator Ervin, I think your testimony has been a welcome addition to the hearing record at this point. I have enjoyed it, and I'm sure everyone else has. I know that Senator Gurney is under pressure to attend another committee hearing, so I will yield to him at this point.

Senator GURNEY. Thank you, Mr. Chairman. I want to echo what the chairman, and also my other chairman, Senator Ervin, has said. I think it was a most scholarly dissertation of this subject, and I think your statement has also been very fair and very reasonable and I agree with the great part of it.

I think the one problem here we are going to have in this business more than any other problem is what do you do when you have differences? This question arises whether they be in different political parties, or different political philosophies. What does the President do in order to protect himself from harassment by the Congress, which has occurred on many occasions.

Now, I'm not accusing any political party of that, because I think both political parties have done it, but that is a part of our problem, and possibly one of the reasons why a Chief Executive will use executive privilege a good deal, that is, to protect some of his important people, either close to him or possibly Cabinet officers from harassment by the Congress. How are we going to resolve that?

I think that is the thing that bothers me more than any one thing.

Senator STEVENSON. Senator Gurney, I tried to address myself to that problem, and not by suggesting that the inherent remedies of the Congress should be repealed. The procedure which I have set out as an answer to the very real question which you raised is an addition to the remedies mentioned by Senator Ervin.

I am saying define—and define reasonably—executive privilege, and I have given some suggestions as to what that definition should be. And then I say that if the President refuses to respect a statutorily defined definition, which presumably will be upheld by the Constitution, then you have a question of law enforcement and the application of that definition to the particular circumstances. I am concerned, however, about the Congress serving as both prosecutor and judge of its own case, and then attempting to enforce its judgment against the Executive. I say prosecute, but take your case to the courts.

If the President and his aides are recalcitrant, if they refuse to obey an order of the court, then they are in contempt of not the Congress, but of the courts, and I think it is unlikely that an Executive is going to want to run that risk of standing in contempt, not only of the Congress, but of the courts, and at that point very likely in contempt of the overwhelming public opinion of the country.

Senator GURNEY. Well, that may be the answer and I certainly listened to your suggestion there with great care because you have the political confrontation situation, which we have today, and let's face it, that is what we have more than anything else, that is a political confrontation between the incumbent and Congress. Some of it is politics, pure and simple, and some of it is politics of the Congress and the Executive, which all goes on regardless of what parties are in and out of the White House and the Congress. And I suppose an arbiter will be the only way we get at that. But I do think, though, it is fair to observe that the political process itself, I think has a way sometimes of resolving things even though that moves on leaden feet, and I think before we get through with the Watergate investigation, we will find that also.

I think the political process is already working and I think probably the political process, as it seeps through the country, is going to produce witnesses, one way or the other—and I know my chairman may disagree with me on this—but I think we are going to get whatever witnesses we want to get, and the witnesses will appear here because of the exposure to the political processes in the Nation, which will force their appearance. I certainly hope so.

Well, one of the other things that bothers me about this question, too—and perhaps you would like to respond on this—at the time that the Founding Fathers set up the kind of government we had, they drew their ideas, obviously, from England, from which we sprang as far as representative government is concerned, and many of the colonial legislatures or whatever they called themselves were based partly upon



English concepts. England had a parliamentary system, where the executive, the prime minister, was in the parliamentary process, and he had to be responsive. And we rejected that, and I think our Founding Fathers were probably as intelligent a group of men politically as we have ever had at any particular time, and I think they set up the kind of government they did because they did want some kind of confrontation and a competition between the executive and the legislative branch. And of course you can find all kinds of arguments about whether our system is better or the English system, but we did set up a competitive confrontation system, and my question to you is don't we want to preserve this in some way? Isn't this a healthy thing if we still want to operate under this kind of a government?

Senator STEVENSON. Exactly. The Founding Fathers were wiser than we. They did establish a system of equal branches, but now one branch is less equal than the others, and that is the reason the abuse of this doctrine of executive privilege bothers me.

The President feels he can with impunity treat the Congress with contempt. My answer to you, Senator Gurney, is let us restore the vision of our founders, and let us restore the government of equal branches—and that one way of doing so is to restore to the Congress its power to compel the attendance of witnesses in the executive branch.

What I have tried to suggest this morning was a procedure for doing that, not with the hope of exciting confrontations in the future, but with the hope of avoiding them, and with the hope that by reclaiming the power and making clear the power, the right, the ability of the Congress to enforce that power, we will help to reestablish the Congress as an equal branch. As an equal branch, I confidently expect such disputes will be resolved, and resolved amicably and reasonably between equals. It breaks down when the branches are not equal, and they are not equal, sir, today.

Senator GURNEY. Well, I couldn't agree with you more on that. I think one of the very healthy things that may come out of this confrontation in this year of 1973 is that Congress, I think, is waking up to the fact that it is not an equal branch, and there are stirrings, and this is one that we are hearing about. If we do something about that, we can become more equal. I would agree with that.

Senator MUSKIE. Thank you, Senator Gurney.

Senator CHILES. No questions.

Senator ERVIN. We had George Washington invoked to justify a certain species of executive privilege. However, George Washington gave the Congress the information they sought. And George Washington said something here—and I think I can invoke him on this—he said the reason they created the three separate departments of Government was because they recognized public officials have a love of power, and a proneness to abuse it, and they believed they could keep them from abusing that power most by dividing the powers of Government among the three departments. And he said it was just as important to preserve the distribution of powers as it was to initiate it in the first place. And he pointed out that they thought it would preserve it by dividing the powers of Government, because each department of Government would resist encroachments upon its constitutional domain by any other department. And I think Congress has the power to conduct investigations, and had the constitutional power to

get witnesses to enable it to do it. And George Washington also said if the people ever got dissatisfied with the distribution of powers, as made by the Constitution, he said, let the people change the distribution of powers, by amendment, as the Constitution provides, but let there be no change by use—in this case of executive privilege—as a weapon by which Government is destroyed.

So I think it is high time for Congress to resist encroachment upon its constitutional domain, but I am like Senator Gurney, I am a peace-loving man, and all I want to see this committee given is the power to investigate the matters it is called on by the Senate to investigate—I am speaking about the select committee—and because it acts as impartial judge, in order to do that, we are going to have to have witnesses. I hope that the witnesses will come down to the committee voluntarily. I am in favor of giving them an engraved invitation to do so. I hope we don't have to resort to subpoenas, and I am praying very fervently that the good Lord will enter this picture and persuade those who have the power over these witnesses to let them come and we will have a very amicable adjustment of that issue. Incidentally, I have a friend out in the country who brings me messages he says the Lord gave him to transmit to me, and I told him that in the interest of time, I wished he would arrange to have the Lord deliver those messages directly to me, instead of through him as an intermediary, but I have asked him to intercede with the Lord to settle this thing by peaceful means rather than by a confrontation. Nobody would enjoy it more than I if that could be done.

Senator MUSKIE. Yesterday, Attorney General Kleindienst seemed to have the same opinion that your friend did.

Senator ERVIN. He mentioned an astounding interpretation of executive privilege, where Congress couldn't even subpoena charwomen to ask whether they sweep the floors in Government properly, unless the President acquiesced in it.

Senator MUSKIE. Anyway, Senator Stevenson, it is obvious, I think, that we have all appreciated your testimony, and its quality. Thank you very much.

Senator STEVENSON. Thank you, Mr. Chairman.

MEMORANDUM PREPARED IN 1971 AT THE REQUEST OF SENATOR STEVENSON OF ILLINOIS

#### THE DOCTRINE OF EXECUTIVE PRIVILEGE

The doctrine of executive privilege has surfaced at the height of several national controversies, either explicitly or implicitly, on a number of occasions in the past months. Few people, it can easily be assumed, understand what it is. What is at issue, however, has great significance to insuring accountability of the President and the entire Executive branch to the Congress and, ultimately, to fulfilling the people's "right to know."

##### A. WHAT IS THE DOCTRINE OF EXECUTIVE PRIVILEGE?

Executive privilege refers to the right of the Executive to withhold information from others. It is most frequently thought of in the context of withholding information from the Congress. The privilege has been asserted directly by the President to prevent information in the form of documents from being disclosed or on behalf of individuals within the executive branch to prevent them from testifying or being questioned. The privilege has also been asserted by other members of the executive branch on behalf of themselves or subordinates.

Executive privilege has also been referred to as executive immunity or executive secrecy, although it is not entirely clear whether the users of these other



expressions have in all cases intended the same meaning as executive privilege. The evidentiary privilege of the Executive to withhold documents in judicial proceedings involving private parties should not be confused with the doctrine of executive privilege. Nevertheless, the reasons underlying the rule of evidentiary privilege may be useful in establishing the scope of executive privilege since they raise analogous (albeit perhaps of different magnitude) problems and considerations for the courts in determining whether information in the control of the Executive should be revealed to the public.

## B. WHAT ARE THE LEGAL AND HISTORICAL BASES OF EXECUTIVE PRIVILEGE?<sup>1</sup>

### 1. *Constitutional bases*

The Constitution contains no explicit statement giving the Executive an absolute right to withhold information from the Congress nor giving Congress an absolute right to obtain information from the Executive. The Constitution gives to the Congress the general power to legislate, and to the President the power to ". . . take care that the Laws be faithfully executed." (Article II, section 3.) Based on this allocation of functions, proponents of executive privilege frequently argue that since the Constitution provides a system of "separation of powers," it necessarily follows that neither branch may interfere in the internal workings of the other and that therefore the Congress may not at will require the Executive to produce any and all documents and to furnish information it desires. Such proponents then conclude that the Executive has absolute discretion to determine what information and documents will be released to Congress. As we shall see, this conclusion is supported neither by the Constitution, constitutional history, statutory provisions nor judicial declarations but only by self-serving statements issuing from the Executive itself and the precedents they have established.

When the Constitution itself is silent on a matter such as this, resort must be had to constitutional history to determine what was intended. A review of English and American colonial practice prior to the adoption of the Constitution clearly indicates that legislative bodies expected and were accustomed to receiving most, if not all, the information they requested. Legislatures were regarded as holding investigative as well as law-making functions. Parliament especially considered itself entitled to information concerning any area of executive activity, notably including foreign relations, and in practice it did in fact receive what it asked for. Modeled after the English experience, colonial legislatures and those of the new states under the articles of confederation also functioned as investigative bodies, as a check on uncontrolled executive power which had in large part been responsible for the desire to break away from English control. On the basis of such history immediately preceding the Constitutional Convention in 1789, it has been persuasively argued by Professor Berger that Congress has the express power to act as the "Grand Inquest," that is, to investigate the operations of the Executive in executing the laws.

Constitutional history also reveals that the Executive, prior to the adoption of the Constitution, did *not* have the power to determine what information could be kept secret from the legislative bodies. Since the Constitution only delegated to the Executive certain specific, *enumerated* powers, which did not include the power to withhold information from the legislature, and since the Executive did not have such power prior to the adoption of the Constitution, then neither constitutional history nor the Constitution itself can be relied upon as granting the Executive the power to withhold. In fact, constitutional history might be relied upon as confirming an absolute right in Congress to information from the Executive.

The proposition that the Congress has a right to receive information from the Executive finds expression in the Constitutional obligation of the President ". . . from time to time (to) give to the Congress Information of the State of the Union . . ." (Article II, section 3). Of course, the key question is how much information does this provision entitle the Congress to receive. It has been argued that the President's annual state of the union message fulfills this constitutional obligation. However, some commentators, including Mr. Justice Story, believe otherwise. Justice Story, for example, read that part

<sup>1</sup> References used in preparing this section on legal and historical bases of the doctrine are listed in an appendix following the text. The most complete and valuable are the articles by R. Berger and B. Schwartz. The Berger article is particularly valuable for its exhaustive consideration of the history of assertion of the privilege. However, both these writers fail to tackle the most sensitive and critical areas of executive privilege, relating to military and diplomatic affairs.

of the Constitution to require the President “. . . to lay before Congress all facts and information which may assist their deliberation, . . .” Professor Berger also argues in favor of a broad interpretation of this requirement as at least a reasonable and necessary part of Congress’ investigative function.

## 2. *Judicial precedents*

The United States Supreme Court has not yet been directly confronted with a conflict between Congress and the Executive concerning a denial of access to information. However, several cases are cited by advocates of both sides of the conflict as authority for their respective positions. The two cases most often cited in support of a claim of privilege are *Boske v. Comingore*, 177 U.S. 459 (1900), and *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1950). These cases, in fact, do not constitute authority for the proposition that the Executive has either absolute or any discretion to withhold information from Congress. The *Boske* case held no more than that regulations promulgated by a department head pursuant to 5 U.S.C. § 22 (basically a housekeeping statute, discussed below) prohibiting employees from releasing certain types of information were valid because the statute on which they were based was valid. The *Touhy* case is the latest important case dealing with the question of withholding information. It holds no more than did the *Boske* case. In fact, the court explicitly stated that it was not passing on the question of what privilege the department head—in that case the Attorney General—might claim *in a judicial proceeding*; and did not even refer to Congressional proceedings. Subsequent to the *Touhy* case, the Supreme Court decided *U.S. v. Reynolds*, 345 U.S. 1 (1952), which held that a department head cannot conclusively assert privilege to withhold documents but rather it is for the court to determine whether the desired documents ought or ought not to be produced. These and other cases cited in support of broad executive discretion involved requests for documents in court proceedings involving private litigants. They indicate that in such proceedings, executive authority to withhold information is based on federal law, that is, 5 U.S.C. § 22, and not on the proposition urged on the Court in the *Reynolds* case of “an inherent executive power which is protected in the constitutional system of separation of power.”

## 3. *Statutory authority*

Until 1958, Executive refusals to provide information to Congressmen or committees were not infrequently based on one of several statutes, usually section 22 of Title 5 U.S.C. It provided:

“The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.”

Both the *Touhy* and *Boske* cases discussed earlier hold that the statute is a housekeeping measure; that is, its purpose was to permit centralization of discretion with respect to decision making concerning requests for documents. Nevertheless, executive departments continued to rely on that statute in refusing information to Congress. The holdings of the *Touhy* and *Boske* cases do not support such a conclusion. Indeed it seems bizarre to rely on a statute passed *by Congress* as authority for denying Congress access to departmental records. There is nothing in the legislative history of that act or of any other in this field which indicates an intention on the part of Congress to yield any right in it to demand information from the departments.

In order to clarify its position, Congress added the following sentence in 1958: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” This amendment makes even more clear the lack of Congressional intent to promulgate a statute designed to act as a shield against inquiry. Certainly if the general public is not to be denied information on the basis of the statute, neither should be the Congress. It is difficult to avoid the conclusion that the statute has nothing to do with the question of executive privilege, let alone that it does not vest uncontrolled discretion in the Executive to withhold information. The same must be said of the Administrative Procedure Act and other statutes relied upon by advocates of executive privilege.

## 4. *Historical precedents*

Proponents of a substantial right of executive privilege also rely upon historical precedents to support their position. They cite incidents of executive refusals to yield information to Congress or of firm statements by Presidents, supported



by opinions of Attorneys General, which purport to set forth the extent of the doctrine. These are weak bases for their position. In some instances, the statements relied on have frequently been taken out of context, either textual or historical, and consequently overemphasize the extent of the conflict at hand or the extent of the claim. For example, President Washington is usually considered to have early and clearly asserted the right of the Executive to withhold information, based on notes taken by Jefferson of a Cabinet meeting called to discuss the request of the House of Representatives for information relating to the abortive St. Clair Expedition. In those notes Jefferson indicates that it was agreed that the Executive "... ought to refuse those (papers) the disclosure of which would injure the public." However, it is seldom revealed by advocates of the privilege that Washington made no public assertion of uncontrolled discretion to withhold documents, and indeed, in the instance in question, all documents were turned over to the House, including those most damaging to the Army's reputation. In other instances in which the privilege has been asserted, careful research by Professor Berger has shown that peculiar circumstances were involved which weaken the validity of citing such instances as support for the doctrine.

Perhaps the most absolute assertion of the privilege made by a President was contained in a letter from Eisenhower to Congress in 1954. He asserted the right flatly to prohibit all executive employees from testifying or producing documents, in the interests of "... efficient and effective administration ... ." This is a long leap from the necessity to guard only the most secret or confidential papers if the public interest so required. It is necessary to recall, however, the circumstances under which Eisenhower made this assertion. Eisenhower sent this message to Congress at the height of the Army-McCarthy conflict (a topic which must be faced squarely by opponents of executive privilege in answering arguments of the possibility of abuse of uncontrolled Congressional powers of inquiry) after a long period of silence on the subject prior thereto.

Furthermore, Executive statements, including opinions of Attorneys General, cannot justifiably be considered as a basis for asserting the validity of the doctrine since they constitute no more than the self-serving statement of one's claim in a dispute. It is, of course, not surprising to find that the Department of Justice invariably supports the broadest claim of privilege asserted at any given period. The most noteworthy opinion is the Memorandum written by Attorney General Rogers during the Eisenhower Administration, a work remarkable apparently for the amount of incorrect research relied on to reach insupportable conclusions.<sup>2</sup>

In recent years, the doctrine of executive privilege has been asserted sparingly. In fact, President Kennedy drastically curtailed the assertion of the privilege and issued a statement to the Executive branch to the effect that he would allow its assertion only in one instance.<sup>3</sup>

President Johnson similarly announced that he would "not permit subordinates to claim executive privilege to withhold government information from the Congress" but that the claim would "continue to be made only by the President."<sup>4</sup>

Although it is perhaps too early to draw a comparison, it would appear that, whereas under Kennedy and Johnson the doctrine of executive privilege may have been on the wane, it appears with Nixon to be waxing again.

In summary, there appears to be little, if any, constitutional, judicial or statutory basis for the doctrine of executive privilege. Why then has the doctrine emerged and continued to have vitality? In part, it is undoubtedly due to the fact of its continued occasional assertion by the Executive and the unwillingness of the Congress to confront the Executive by challenging such assertion. The mere assertion of the privilege, of course, does not make it legally justified. However, the more one hears a statement and the longer such statement continues to go unchallenged, the more likely is one to believe that such statement is valid. So it appears to be with executive privilege. In addition to the bare assertion of the doctrine, from time to time self-serving statements have been issued by the Executive, for example, the opinions of Attorneys General. Not surprisingly, if these statements or opinions, however ill-founded they may be, are not effectively challenged, they will inevitably lend further support to the acceptance of the doctrine and will become part of a folklore which is ultimately accepted as truth.

<sup>2</sup> See generally, Berger, *Op. cit.*

<sup>3</sup> Government Information Memorandum 43. (Unfortunately, we have been unable to obtain a copy of this memorandum.)

<sup>4</sup> See Berger, *Op. cit.*, footnote 548.

In part, the doctrine may also continue to have vitality by reason of its acceptance by some Congressmen as a sound doctrine. There are no doubt many Congressmen who believe that the Executive should have the right to deprive them of information and, therefore, ultimately deny the public of the "right to know." To what extent this attitude might be mixed or confused with the erroneous belief that the President *does* have this right rather than *should* have this right is, of course, impossible to say.

#### C. SHOULD THERE BE A DOCTRINE OF EXECUTIVE PRIVILEGE?

Assuming that there is no legally compelling basis for the doctrine of executive privilege, nevertheless *should* there be a doctrine on grounds of policy or practical considerations and, if so, what should its scope be?

##### 1. Policy considerations

Congress has a rather clear constitutional "right to know", and it has an even clearer "need to know" much information to which only the Executive has access if Congress is to fulfill its constitutionally established responsibilities.

Unlimited or even significant executive discretion to withhold information from the Congress hinders its ability to carry out its constitutionally delegated powers, particularly those of enacting laws and controlling appropriations. Without accurate and complete information concerning the administration of the laws it has passed, Congress would be unable properly to assess their effectiveness in accomplishing the desired goals. Executive branch abuses in administration could be and in fact have been covered up—for example, the Teapot Dome scandal, discovery of which interested persons in the executive branch successfully resisted for several years. In addition, the location of power over the purse strings was deliberately placed in a branch other than that which was to spend funds, in order again to minimize abuse and indiscretion.

Congress should be fully informed of the manner of execution of the laws. It should therefore have access to information and documents in the possession of the executive, whether secret or not. The mere classification of a document as "confidential" or "classified" by some lower echelon executive official should not affect the right of Congress to be informed. Certainly the collective responsibility of Congress in running the government requires that it be informed. Therefore, the ultimate decision concerning Congressional access to information should not be vested in the executive branch.

If the Executive is entitled to withhold information from the Congress and as a result the Congress is not fully informed as to the actions and plans of the Executive, the dangers of increasing concentration of governmental power within the executive branch becomes significant. It was precisely this type of concentration which drafters of the Constitution feared and sought to prevent through the establishment of a Congress sufficiently empowered by the Constitution to check such power. Of course, history has seen the enormous growth of the executive branch, both in size and power, with little or no parallel growth in the Congress. Even within the executive branch there has occurred an extraordinary concentration of policy making within the White House staff itself. In the meantime, the Congress has assumed an increasingly less significant role in determining the destiny of this country. This trend is inevitable if Congress is denied the necessary information it needs to effectively participate in national policy-making.

One glaring consequence of this development is our present deep military and economic involvement in Southeast Asia, expanded and administered largely without giving full information to Congress, in spite of frequent demands by it to be informed in order to be able competently to exercise its power to raise and maintain an army and to declare war.

The recent revelations concerning the "Pentagon Papers" underscore the enormity of consequences to the nation of a decision which, in fact, was made by a very limited group of people who were apparently the only ones with access to the available information. The fortuitous circumstances surrounding the publication of the "Pentagon Papers" highlights the need for the Congress to have a clearly established right to such information. The access of the Congress (and ultimately that of the people) should not depend on the right of freedom of speech and of the press alone. Such rights, as this recent incident showed, can only be of value if some individual gains access to such information and is able to publish it. To ensure that the public's "right to know" and the Congress' "right to know" (which of course is even more compelling than the public's) do not depend upon such fortuities, Congress' right to obtain information from the Executive must be firmly established.



## 2. *Practical considerations.*

A number of practical considerations have been raised by advocates of executive privilege to support the denial of access of the Congress to certain information. It has been argued that to make information of a "top secret" nature pertaining to military or diplomatic decisions or plans available to the Congress is tantamount to broadcasting it to the world, it being assumed that there are Congressmen more interested in promoting their careers than in promoting the national welfare. This is possible, but it is perhaps equally possible that certain employees of the executive branch also cannot be trusted with information crucial to the national security. Furthermore, practical experience in Great Britain shows that legislative bodies *are* capable of keeping secret information secret (although one does have the feeling that the British are still a little bit more civilized than we Americans). It has also been argued that permitting the Congress access to information from the executive as well as the opportunity to require members of the executive branch to give testimony and answer questions will lead to inefficiencies in the operation of the Executive. This argument, needless to say, is without much merit considering the policy considerations involved. Finally, it has been argued that members of the executive branch and its advisors will be reluctant in the future to express their views freely to the President and to put them in writing for fear of having to make these views available to the Congress and possibly to the public. It would seem that any person who is reluctant to have his views bear the scrutiny of the Congress, or perhaps subsequently, the public, perhaps has not sufficiently considered and substantiated his views to justify any audience whatsoever, much less that of the President who might make a major policy decision based on such views.

## 3. *Proper scope of executive privilege.*

Policy considerations based upon the national security arguably justify some limitations on the public's access to information from the Executive and, conceivably, the Congress' access. The enunciation of a limitation based on such a policy consideration was attempted by certain members of the Supreme Court in the recent *New York Times* decision. A similar formulation is perhaps justified in imposing limitations on the public's right to information.

Whether an analogous formulation to limit Congress' right to information, albeit more limited in scope, can be justified is a difficult question. Assuming that there is some justification based on national security considerations, perhaps these can best be satisfied by imposing no limitation on the Congress' ultimate access to information, but rather, as has been suggested by some, merely limiting such access to a selected group of members of the Congress with respect to matters of "top secrecy".

Senator Fulbright's bill concerning executive privilege sets very little limitation on the Executive's power to assert the privilege. The bill grants to the President the absolute power to assert executive privilege on behalf of a member of the executive branch with the only limitation that he do so personally and in writing. This bill would prevent members of the Executive branch other than the President from asserting the privilege on their own behalf or on behalf of others and thereby would eliminate indiscriminate and frequent resort to the privilege. In practical terms, the President is apt to be reluctant to permit use of the privilege if he knows he must bear personal responsibility before Congress for such assertions. However, it would probably not reduce significantly the "chilling" effect which the threat of the President's assertion of the privilege at any time will have on the Congress' eagerness to request information. Furthermore, this bill would merely, in effect, codify the practice of self-restraint which had been adopted at least by President Kennedy and perhaps by President Johnson and in no way would limit the absolute discretion which the President now exercises over withholding information. At the very least, the bill should seek to reduce this unfettered discretion by limiting the President's privilege to withhold only information which, to use a phrase adopted by several of the Justices in the recent *New York Times* case, if released would present "a direct, immediate and irreparable damage to our nation or its people," (Justice Stewart) The most serious defect of Fulbright's bill is that it would clearly establish by statute the right of executive privilege and, in so doing, would legitimate a right which, as indicated earlier, it is not at all clear the President ever had.

Perhaps the best solution of the executive privilege problem could be outlined as follows:

(a) The Executive and the Congress should be made fully aware of the fact that the doctrine of executive privilege has questionable legal bases.

(b) Such an awareness would hopefully lead to elimination of the above described "chilling" effect upon the Congress' eagerness to seek information and would reduce substantially the Executive's unwillingness to provide such information.

(c) Accordingly, both the Executive and individual members of the Congress would be inclined to be taken into each other's confidences on an informal basis and the necessary flow of information could be established.

(d) In this way, direct confrontations between the Congress and the Executive could be avoided and the necessity of "flood-lighted" Congressional hearings would be reduced. The result would be a much more meaningful exchange of information than is ever likely to occur in the highly charged and less than candid atmosphere of Congressional hearings.

#### APPENDIX

##### *Articles*

Bishop, "The Executive's Right of Privacy: An Unresolved Constitutional Question," 66 YALE L.J. 477 (1957).

Kramer and Marcuse, "Executive Privilege—A Study of the Period 1953-1960," (pts. 1-2), 29 GEO. WASH. L. REV. 623, 829 (1961).

Mitchell, "Government Secrecy in Theory and Practice: Rules and Regulations as an Autonomous Screen" 58 COLUM. L. REV. 199 (1958).

Schwartz, "Executive Privilege and Congressional Inquiry Power," 47 CALIF. L. REV. 3 (1959).

Wolkinson, "Demands of Congressional Committees for Executive Papers," 10 FED. B. J. 103 (1949).

Yainger, "Congressional Investigation and Executive Secrecy a Study in the Separation of Powers," 20 v. PITT L. REV. 755 (1959).

##### *Government Documents*

"Memorandum for the President from the Attorney General", [The Brownell Memorandum], 100 Cong. Rec. 6621 (1954).

"The Right of Congress to Obtain Information from the Executive and from other Agencies of the Federal Government," Committee Print, Senate Committee on Government Operations, 84th Congress (1956).

Senator MUSKIE. Our next witness is the Comptroller General of the United States, the Honorable Elmer Staats. Mr. Staats has helped the Congress on countless occasions in exercising the functions Congress has given the General Accounting Office. He has met with resistance on occasion from the executive branch, and so we welcome his testimony about such problems and the suggestions he may introduce to overcome them.

It is a pleasure to welcome you, Mr. Staats.

#### STATEMENT OF HON. ELMER STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ACCOMPANIED BY PAUL G. DEMBLING, GENERAL COUNSEL, AND JOHN MOORE, ASSOCIATE GENERAL COUNSEL

Mr. STAATS. Thank you.

At your request I appear today in connection with the hearings on S. 1142, S. 858, and Senate Joint Resolution 72 relating to congressional and public access to executive branch information.

S. 1142 proposes a number of procedural and substantive amendments to the Freedom of Information Act, 5 U.S.C. 552, designed primarily to enhance public access to Government information.



Senate Joint Resolution 72 and S. 858 would prohibit refusals on the part of any Federal officer or employee to appear, testify, and produce documents before either House or any committee of the Congress except where the President formally and in writing invokes executive privilege. Whether the invocation of executive privilege before a congressional committee or subcommittee is well taken would be for determination by the full committee and ultimately by the appropriate House—or both Houses in the case of a joint committee.

S. 858, in section 307, also deals with access on the part of congressional committees and by the General Accounting Office to information under the custody and control of a Federal agency. Subsection (f) would provide for a fund cutoff if the General Accounting Office determines that any information requested by it or by a congressional committee or subcommittee has not been made available within 30 days following the request, and within such period the President has not signed a statement invoking executive privilege.

Of the measures discussed herein, section 307 of S. 858 relates most directly to the functions of the General Accounting Office. Accordingly, I will address my remarks primarily to the provisions of this section in terms of the efforts of our Office to secure access to executive branch information necessary to the full and effective performance of our functions as an arm of the Congress.

One of the most important duties of GAO is to make independent reviews of agency operations and programs and to report to the Congress on the manner in which Federal departments and agencies carry out their responsibilities. The Congress, in establishing GAO, recognized that the Office would need to have complete access to the records of the Federal agencies and provided that basic authority in section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 53, 54), as follows:

All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

This goes back to 1921.

The more important factors underlying the law, the intent of the Congress, and the GAO's policy of insisting on generally unrestricted access to pertinent records of agencies and contractors in making audits and reviews are four in number.

1. An adequate, independent, and objective examination contemplates obtaining a comprehensive understanding of all important factors underlying the decisions and actions of the agency or contractor management relating to the subject of GAO examinations.

2. Enlightened management direction and execution of a program must necessarily consider the opinions, conclusions, and recommendations of persons directly engaged in programs that are an essential and integral part of operations. Similarly, knowledge of this type is just as important and essential to us in making an independent review and evaluation as it is to management in making basic decisions.

3. Agency internal audits and other evaluative studies are absolutely necessary. They are important tools by which management can

keep informed of how large and complex activities are being carried out. Knowledge of the effectiveness with which internal review activities are carried out and the effectiveness with which corrective action where needed is taken is absolutely necessary to GAO in the performance of its responsibilities.

4. Availability of internal audit and other evaluative documents to GAO enables us to concentrate a greater part of our efforts in determining whether action has been taken promptly and properly taken by agency officials to correct identified weaknesses, and helps eliminate duplication and overlapping in audit efforts.

Now, from this discussion, I believe it is self-evident that the GAO, as an oversight arm of the Congress, cannot be effective if it does not have full access to records, information, and documents pertaining to the subject matter of an audit or a review. The intent of the various laws assigning authority and responsibility to the GAO is clear on this point. The right of generally unrestricted access to records is based not only on laws enacted by the Congress but is a necessary adjunct to the duties and responsibilities of the Comptroller General. Let me quote from two general statutes to make my point doubly clear.

I would just like to refer here—and I will not read them—but I would like to refer to two particular statutes. One is the Legislative Reorganization Act of 1946, which calls on the GAO to make expenditure analyses of the executive branch programs and report such analyses to the Congress, or to respond to inquiries on the same line from the committees of the Congress.

Now, my point in citing these two statutes, Mr. Chairman, is to emphasize the fact that without adequate and full information, we would not be able to carry out this important charge that we have.

#### LEGISLATIVE REORGANIZATION ACT OF 1946

##### EXPENDITURE ANALYSES BY COMPTROLLER GENERAL

SEC. 206. The Comptroller General is authorized and directed to make an expenditure analysis of each agency in the executive branch of the Government (including Government corporations) which, in the opinion of the Comptroller General, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller General, from time to time, to the Committees on Government Operations, to the Appropriations Committee, and to the legislative committees having jurisdiction over legislation relating to the operations of the respective agencies, of the two Houses.

#### LEGISLATIVE REORGANIZATION ACT OF 1970

##### ASSISTANCE TO CONGRESS BY GENERAL ACCOUNTING OFFICE

SEC. 204. (a) The Comptroller General shall review and analyze the results of Government programs and activities carried on under existing law, including the making of cost benefit studies, when ordered by either House of Congress, or upon his own initiative, or when requested by any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over such programs and activities.

(b) The Comptroller General shall have available in the General Accounting Office employees who are expert in analyzing and conducting cost benefit studies of Government programs. Upon request of any committee of either House or any joint committee of the two Houses, the Comptroller General shall assist such committee or joint committee, or the staff of such committee or joint committee—

(1) in analyzing cost benefit studies furnished by any Federal agency to such



committee or joint committee; or (2) in conducting cost benefit studies of programs under the jurisdiction of such committee or joint committee.

Senator MUSKIE. May I interrupt there? I won't interrupt often in your prepared testimony, but let me interrupt at this point to relate what you are saying to two of the issues that now have been generated between the Congress and the President. First, the White House witnesses insist that the Congress get its financial house in order, if the Congress wishes to exercise its constitutional power over the purse. Well, the legislation you just referred to here relating to our organization represents a long-standing effort by the GAO, an institution serving as the arm of the Congress to do just that. So it is your role to give or to get information for the Congress, to evaluate the effectiveness with which the programs it authorizes are carried out. That is the first issue.

The second issue was raised in connection with the action taken by the Senate last week in enacting the Ervin impoundment legislation to which was attached an amendment setting a ceiling of \$268 billion for the 1974 fiscal year. In that legislation, we provided that if congressional action should result in projected expenditures exceeding the ceiling, that the President would be authorized to cut back, but that he must do so in a proportionate way, across the board. Mr. Ziegler's response to that was that the White House couldn't accept it, because if there were to be cuts, in his judgment, the cuts should be in programs that were proven ineffective on the record. Well, one of your authorities here cited by you is the powers used to help the Congress determine whether programs are ineffective, and yet Mr. Kleindienst yesterday announced the doctrine that the executive branch could refuse any and all information without exception to the Congress. So that we have here, in a period of a few days, the assertion by the President's press secretary that the President ought to have authority to cut programs on the basis of his own finding as to the ineffectiveness of such programs and a statement by the Attorney General that the executive branch can deny to the Congress the information it would require to make a similar finding. So it is denying to the Congress a similar access to information in pursuit of its constitutional responsibilities over the budget.

I think it is important to point that out, and I am not going to ask you to respond to this essentially political statement—political with a small “p”—but I think it is important to call to the attention of the press and to the country that this is the inconsistent effect of these two policy approaches that have been taken by the White House. The White House, in other words, does not seem to be truly interested in a more effective exercise of constitutional responsibilities by the Congress. It seems rather to be interested in diminishing the effectiveness of the Congress in exercising its constitutional responsibilities.

I simply wanted to take this moment and interrupt your testimony at this point to make that statement.

Mr. STAATS. Thank you, Mr. Chairman.

I would comment to the effect that it is quite obvious to us—and I think this comes out more clearly as we proceed through our statement—that our capability to assist the Congress in putting its fiscal machinery in better order is dependent almost entirely on our ability

to get good information from the executive branch, irrespective of what machinery the Congress may decide to establish additionally, and as a result of the work of the Joint Study Committee on Budget Control. They are going to be faced with exactly the same problem. They will not be able to perform effectively without full and complete information.

Mr. Chairman, where the Congress has chosen to limit the scope of GAO's audit responsibilities, it has done so in specific statutes. For example, the GAO does not have the responsibility for auditing the activities and operations of agencies such as the Federal Reserve Board and the Comptroller of the Currency, which agencies derive their financial support by contributions from member banks. Likewise, Congress has explicitly provided that certain confidential funds be kept exempt from GAO scrutiny. In other words, the Congress has chosen to limit GAO explicitly with respect to particular statutes and particular programs. In the absence of such restrictions, we believe that the Congress intended that the basic authority and responsibility of the GAO applies.

I would like to emphasize that we have had generally good cooperation from the executive branch in obtaining access to information needed to carry out our responsibilities. Generally, there has been a recognition on the part of the executive branch that the GAO must have information if it is to make valid judgments. Without adequate information, there is a danger that our conclusions and recommendations will be based upon incomplete or inaccurate data. Therefore, there is a risk that the Congress and the public can be misled and a disservice rendered to the operating agencies unless there can be reasonable confidence that the information on which our conclusions and recommendations have been developed is full and complete.

We in the GAO have long recognized the sensitivity of the role which we play in that we are, an outside party, issuing reports—mostly public reports—which may be critical of the manner and effectiveness with which executive branch programs are carried out. Recognizing this sensitivity, we have attempted to “lean over backwards” to obtain all of the pertinent facts and to afford the agency an opportunity orally and in writing to state the facts as they see them, together with any differences of opinion as to the conclusions and recommendations contained in our reports.

I should add where these differences do exist, they are incorporated in our reports, so they are there for everyone to see.

This effort on our part to adhere to strict standards of objectivity and fairness has been an important factor in obtaining cooperation from agencies which we need to carry out our responsibilities. An example of where such cooperation did not exist was the action of the Secretary of the Treasury in denying access by the General Accounting Office to the records of the Emergency Loan Guarantee Board in December 1971, in which he stated that, “the Board concluded at its meeting on November 17 that it was not the intent of the Congress that the General Accounting Office review its decisions.” He further stated that the Board found nothing in the legislative history to suggest that the Congress intended that GAO should review the work of the Board, indicating:



The Board as constituted by the Congress is uniquely well qualified to make the determinations called for by the Guarantee Act, including the critical finding of whether failure to guarantee a loan would have an adverse effect on the economy.

You recall this was the statute that was enacted to deal with the situation involving the Lockheed Corp.

While the records in this case were subsequently made available, the Treasury did so only because of the intervention of the House and Senate Banking and Currency Committees. In making the records available, however, the executive director of the Board stated that:

We continue to believe that the GAO does not have the statutory authority to review the Board's internal records relating to its decisionmaking process.

The Board supported this position in its first annual report of July 31, 1972.

Treasury also made the argument that the GAO was attempting to seek access to records relating to matters for which decisions had not yet been made. The argument was then extended to encompass all information even where decisions had actually been reached.

I would like to take this opportunity to clarify this point. We do not expect to receive nor do we need to receive access to information relating to decisions not yet made. We do not need nor do we seek authority to obtain such information prior to decisionmaking to carry out our present responsibilities.

We can fully appreciate the executive branch position of not releasing internal working papers involving tentative planning data until a decision has been reached. Our problems, however, involve the withholding of such information after a decision has been reached. If we are to make intelligent, effective and useful evaluations of management processes and the results of ongoing programs, it is essential that we have access to the information available to and used by those involved in the decisionmaking process.

Executive privilege, as such, has not been exercised with respect to providing information to the General Accounting Office directly. The use of executive privilege by the President with respect to information sought by the Congress, however, complicates the problem of access to information to the General Accounting Office.

Particularly disturbing is the fact that the departments and agencies have interpreted the President's exercise of executive privilege more broadly than the specific directives of August 30, 1971, relating to military assistance and March 15, 1972, related to the USIA and AID. Our impression is that many officials of the departments and agencies of the executive branch concerned have interpreted the President's directive to be not limited to the specific requests which prompted the exercise of executive privilege but rather as a standing directive that no internal working documents, detailed planning data, or estimates as to future budget requirements will be made available to the Congress or the General Accounting Office without the approval of higher authority. Our concern in this respect is supported by the general directives which were issued to carry out the President's policy. In other words, agencies have become super cautious and want to run no risk that either the letter or the spirit of the directives will be violated on an "across-the-board" basis. My opinion is that the President had no such purpose but the effect has been

nevertheless to require additional records screening, additional referrals up the organizational hierarchy, and tremendous delays in making information available to us.

Senator MUSKIE. In other words, there has been a chilling effect upon your right to get information?

Mr. STAATS. That is right.

A far more common problem arises from a practice which might be characterized as "department" or "agency privilege" whereby executive officials refuse to furnish us particular records or documents which they do not consider appropriate for our review. Such refusals do not purport to represent assertions of executive privilege; and we are unaware of any legal authority which even arguably supports the arrogation of such discretion on the part of agency officials. In addition, this practice appears to be in conflict with the President's 1969 memorandum "Establishing a Procedure to Govern Compliance with Congressional Demands for Information." This memorandum—which is apparently still in effect and, I am sure, is familiar to all of you—states in part:

The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For these reasons executive privilege will not be used without specific Presidential approval \* \* \*."

The memorandum goes on to specify procedural steps to be followed by the agency heads when they believe that compliance with a request for information from a congressional agency raises a substantial question as to the need for invoking the privilege. The effect of the memorandum would seem to require compliance with congressional requests for information—including requests by GAO—except when executive privilege is formally invoked upon approval by the President. However, resort to the procedures set forth in the President's memorandum appears to be the exception rather than the rule in terms of noncompliance with requests by our office.

An additional obstacle to our efforts in securing information—perhaps an outgrowth of the practice described above—consists of laborious internal agency review and clearance processes which are applied to our requests for certain types of information. Examples of this practice include "screening" of files and referrals to Washington of requests made by our auditors at overseas locations. Such practices do not of themselves amount to denials of access. However, the delays which they occasion can have a crippling effect upon the conduct of our audits and reviews, and present a serious practical impediment to the efficient accomplishment of our work.

We believe that enactment of S. 858—particularly section 307—would go far in ameliorating the access to records difficulties which I have described in two major respects. First, it would enact into law the apparent thrust of the President's memorandum that executive branch information may be denied only by invocation of executive privilege upon personal approval of the President. Any doubt which might exist concerning the comprehensive effect of the memorandum and its application to our office would also be resolved by the proposed statutory language. In addition, the requirement that the President's



approval be evidenced in writing should serve to eliminate any ambiguity which might otherwise arise as to whether requirements have been followed. The experience which had developed under the President's 1969 memorandum serves to recommend the desirability of this approach.

I refer to the very excellent statement from the Congressional Research Service published in the Record of March 28, 1973.

Second, and of equal significance from an operational viewpoint, section 307 would impose specific time limits for compliance with requests for information or formal invocation of executive privilege. The ultimate 30-day limit would be enforceable by a fund-cutoff provision. This approach would, of course, have a substantial impact upon the delaying tactics which now confront us.

The language of subsection (c) of proposed section 307 accords a general right of access to information "relating to matters within the jurisdiction" of congressional committees and the General Accounting Office and, therefore, will not necessarily resolve this problem. Subsection 307(b) contains a very limited definition of the term "agency" as used in section 307. We suggest that the term "agency" be defined to mean an executive department, an independent agency, an independent establishment, a Government corporation, the military departments, and the government of the District of Columbia.

As I have already stated, the bill in its present form would have a substantial and salutary effect upon many of our current difficulties. I might state at this point that our office has had under consideration for some time possible legislative proposals which would relate directly to our access to records difficulties. Draft statutory language, which I have attached to my statement—attachment No. 1—would authorize the Comptroller General to institute a civil action in the U.S. district court for declaratory relief when, in his opinion, information to which he is legally entitled is not made available to him. Assuming favorable action by the courts, the Comptroller General would then be permitted, after having the matter lie before the Congress for 30 days, and absent contrary congressional action, to deny funds for that part of the agency involved in the audit.

Mr. Chairman, this concludes my prepared statement. I am attaching—attachment No. 2—a more complete statement of some of the serious access to information situations with which we have been concerned. I would be glad to answer any questions.

I have also attached a more detailed and complete statement of some of the serious access to information situations which we have been confronted with over the past 2 or 3 years. I will not take the time of the committee to read that, but with your approval, I would like to include that as part of my statement.

Senator MUSKIE. Without objection that will be included, and we appreciate having it.

[The attachments Nos. 1 and 2 of Elmer B. Staats follow:]

[Attachment No. 1]

ACCESS TO RECORDS BY THE GENERAL ACCOUNTING OFFICE

SEC. Section 313 of the Budget and Accounting Act, 1921 (31 U.S.C. 54), is amended to read as follows:

"SEC. 313. (a) Except where otherwise specifically provided by law including the authority contained in section 291 of the Revised Statutes (31 U.S.C. 107),

all departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, organization, transactions, operations, and activities of their respective offices as he may from time to time require of them; and the Comptroller General or any of his duly authorized representatives shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers or records of any such department or establishment.

“(b) (1) Each recipient of Federal assistance pursuant to grants, contracts, subgrants, subcontracts, loans or other arrangements, entered into other than by formal advertising, shall keep such records as the head of the department or establishment involved shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

“(2) The head of such department or establishment and the Comptroller General, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in paragraph (1) of this subsection, have access for the purpose of audit and examination to any books, documents, papers and records of such recipients which in the opinion of the head of the department or establishment or the Comptroller General may be related or pertinent to the grants, contracts, subgrants, subcontracts, loans or other arrangements referred to in paragraph (1) of this subsection.”

SEC. (a) If any information, books, documents, papers or records requested by the Comptroller General from any department or establishment under section 313(a) of the Budget and Accounting Act, 1921, as amended, or any other authority, has not been made available to the General Accounting Office within a period of twenty calendar days after the request has been delivered to the office of the head of the department or establishment involved, the Comptroller General may institute a civil action in the United States District Court for the District of Columbia for declaratory relief in accordance with subsection (b) of this section. The Attorney General is authorized to represent the defendant official in such action. The Comptroller General shall be represented by attorneys employed in the General Accounting Office and by counsel whom he may employ without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapters III and IV of chapter 53 of such title relating to classification and General Schedule pay rates.

(b) Actions instituted pursuant to subsection (a) of this section shall be for the purpose of declaring the rights and other legal relations of the parties, in accordance with section 2201 of title 28, United States Code, concerning the Comptroller General's request for information, books, documents, papers, or records and no further relief shall be sought by the parties or provided by the court. Such actions shall be heard and determined by a district court of three judges. Immediately upon the filing of a complaint under subsection (a) of this section the matter shall be referred to the chief judge of the United States Court of Appeals for the District of Columbia Circuit, who shall designate three judges, at least one of whom shall be a circuit judge, to sit as members of the court to hear and determine the action. Actions under this subsection shall be governed by the rules of civil procedure to the extent consistent with the provisions of this section, and shall be expedited in every way.

(c) Any party may appeal directly to the United States Supreme Court from a declaratory judgment under subsection (b) of this section. Such appeal shall be taken within thirty days after entry of the judgment. The records shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(d) (1) Subject to paragraph (2) of this subsection, if after a declaratory judgment sustaining the Comptroller General's right to all or any information, books, documents, papers, or records requested becomes final, such information is not made available to the General Accounting Office, no appropriation made available to the bureau, office or unit of the department or establishment which the Comptroller General identifies as being under review shall be available for obligation unless and until such information is made available to the General Accounting Office.



(2) Paragraph (1) of this subsection shall not become operative unless:

(A) the Comptroller General determines to invoke the provisions thereof and files with the Committees on Government Operations of the Senate and the House of Representatives notice of his determination, together with identification of the bureau, office or unit under review and the appropriations available thereto; and

(B) during thirty calendar days (excluding the days on which either House is not in session because of adjournment of more than three days to a day certain or an adjournment of the Congress sine die) following the date on which the Comptroller General files such notice, neither House has passed a resolution stating in substance that it does not favor invocation of such provision.

(c) Where the conditions set forth hereinabove are satisfied paragraph (1) of subsection (d) shall become operative on the day following expiration of the thirty-day period specified in subsection (d) (2) (B).

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[Attachment No. 2]

## AREAS OF SERIOUS ACCESS TO INFORMATION SITUATIONS CONFRONTED BY GAO

### INTERNATIONAL ACTIVITIES

We have been experiencing increasing difficulties in obtaining access to information needed in our reviews and evaluations of programs involving our relations with foreign countries and United States participation in international lending institutions. The Departments of Defense, State, and Treasury have employed delaying tactics in preventing our access to necessary records. Information and records have been withheld on the basis that they were internal working documents or that they disclosed tentative planning data. The most serious interference has resulted from restraints placed upon agency officials which require them with more and more frequency to refer to higher authority for clearance before making records available to our staff.

On August 30, 1971, the President invoked executive privilege to withhold information which had been requested by the Senate Foreign Relations Committee relating to the Military Assistance Program. The President determined that it would not be in the public interest to provide to the Congress the basic planning data on military assistance that was requested by the Chairman of the Senate Foreign Relations Committee, and he directed the Secretary of State and the Secretary of Defense not to make available to the Congress any internal working documents which would disclose tentative planning data on future years of the Military Assistance Program which are not approved executive branch positions.

Subsequent to this action we noted a general increase in the volume of documents that operating officials were referring to higher authority for approval for release to our auditors. This practice added to the delays in obtaining access to documents that had hampered our audit efforts in the past. Although absolute denial of access to a document is quite rare, our reviews have been hampered and delayed by the time-consuming processes employed by the various organizational elements within and between the executive agencies. These delays occur in screening records and in making decisions as to whether such records are releasable to GAO. It is not unusual for our staff people to request access to a document at an overseas location and to be required to wait several weeks while such documents are screened through channels from the overseas posts and through the hierarchy of the departments involved.

The increasing concern of the Comptroller General, especially with actions within the Department of Defense that were having the effect of denying GAO access to information and documents needed to carry out our responsibilities for review of international activities of the Department of Defense, in particular military assistance activities, prompted him to write to the Secretary of Defense on October 13, 1971. He cited examples of our access problems and pointed out specific DOD instructions and directives which, we believed, had created an atmosphere that was discouraging overseas agency officials from cooperating with GAO personnel. In reaching for a solution to this complex problem, the

Comptroller General summarized his position to the Secretary of Defense as follows:

"I am most interested, as I am sure you are, in establishing a mutual accommodation within which we can carry out our respective responsibilities, with due regard to the sensitivities of the matters under review.

"I believe you can appreciate the depth of my concern at what appears to be an increasing effort within the Department of Defense to restrict the General Accounting Office's capability to carry out its responsibilities to the Congress in the field of international matters.

"To clear the air and set the stage for joint efforts to establish better working relationships I believe that a personal expression of your views communicated to your representatives in Washington and overseas would be extremely helpful. We would then be glad to work with the Assistant Secretary of Defense (Comptroller), or others that you designate, in the interest of accomplishing mutually acceptable working arrangements."

On January 27, 1972, the Secretary of Defense replied, stating:

"At the outset, let me assure you that neither the Assistant Secretary of Defense (ISA) nor myself condone any actions which could be interpreted as restricting your auditors from carrying out their responsibilities in the field of international matters or discouraging overseas officials from cooperating with your auditors in the performance of their statutory responsibilities."

He also indicated a need and intent to continue to screen the files of the Department before making them available for our review and stated:

"Papers in these files originate within as well as outside the Department, including The White House, and Department of State. I am sure that you appreciate that merely because such papers are in our files we cannot release them to GAO without the express approval of the originator. Fortunately, however, it is only on rare occasions that GAO auditors actually need access to such papers to complete their audits or reviews. The matter of access to such papers must, I believe, continue to be handled on a case-by-case basis. In the future, when the question of access to sensitive documents in the international affairs area arises, I have asked the Assistant Secretary of Defense (ISA), when he believes that access to a particular document should be denied, that he consult with the Assistant Secretary of Defense (Comptroller) and the General Counsel prior to refusing access."

The Secretary suggested that to clear the air and set the stage to establish better working relationships that DOD and GAO send representatives to some overseas locations with a view to creating an atmosphere of mutual cooperation and understanding.

Since the exchange of letters we have been meeting with Defense officials in an attempt to establish mutual working arrangements within which we can carry out our responsibilities. While we have vigorously pursued this matter with agency officials, we see no real breakthrough which will solve our problem. The most serious interference is in the restraints which have been placed upon agency officials overseas and which require them more and more to refer to Washington for clearance before making documents available to our staffs. Although these are not termed refusals, they come close because of the interminable delays that result from having to refer routine matters through channels to Washington.

On March 15, 1972, the President invoked executive privilege with respect to the foreign assistance program and international information activities. In a memorandum to the Secretary of State and the Director, United States Information Agency he directed these officials not to make available to the Congress any internal working documents which would disclose tentative planning data—such as is found in the Country Program Memoranda and the Country Field Submissions—and which are not approved positions.

Since then we have experienced some tightening up on our access to documents. For example, the Agency for International Development on March 23, 1972, instructed its operating personnel as follows:

\* \* \* \* \*

"In order to carry out the President's directive, A.I.D. Country Field Submissions should not be disclosed to representatives of the Congress or the General Accounting Office. Likewise, disclosure should not be made of any other document from an A.I.D. Assistant Administrator, A.I.D. Office Head or A.I.D. Mission



Director to higher authority containing recommendations or planning data not approved by the Executive Branch concerning overall future budget levels for any fiscal year for any category of assistance (e.g., Development Loans, Technical Assistance, Supporting Assistance, or PL-480) for any country.

"In lieu of the disclosure of such documents, the President has directed that Congress be provided with "all information relating to the foreign assistance program and international information activities" not inconsistent with his directive. Ordinarily, the substantive factual information contained in these documents should be disclosed through means of oral briefings, testimony, special written presentation and such other methods of furnishing information as may be appropriate in the circumstance.

"The General Counsel should be advised of any Congressional or GAO requests for any document described in [the first paragraph] above or for files or records containing such a document. The General Counsel should also be advised of requests for other documents which raise Executive Privilege questions, whether under the rationale of the President's March 15 directive or otherwise, and a decision should be obtained from the General Counsel concerning the availability of the document for disclosure before the document is disclosed."

On May 8, 1972, the Under Secretary of State issued a memorandum to all Agency Heads, Assistant Secretaries, and Office Heads on the subject of executive privilege. This memorandum cites the Presidential Directive of March 15, 1972, and contains instructions similar to those put out by AID. However, it goes a bit further in broadening the field of applicability by stating :

"It will be noted that the President's directive is not strictly limited to Country Program Memoranda and Country Field Submissions, but applies also to other, similar internal working documents in the foreign assistance and international information fields which would disclose tentative planning data and which are not approved positions. Undoubtedly, specific questions will arise in the future as to whether or not the President's directive applies to particular congressional requests for disclosure. Such questions should be resolved in consultation with the Office of the Legal Adviser."

There is evidence that the executive agencies may try to satisfy GAO's need for access to records by providing the required information by means other than direct access to the basic documents, especially in cases where such documents are considered to be internal working documents. This would not be acceptable unless we are able to satisfy ourselves that the data provided to us is an accurate presentation of the substantive information contained in the basic documents.

In summary, our access to the records and documents or other materials we need to carry out our responsibilities for reviewing programs relating to international activities has been increasingly difficult. It is a matter of degree, but it has seriously interfered with the performance of our responsibilities. The most serious interference is in the restraints which have been placed upon agency officials overseas and which require them more and more to refer to Washington for clearance before making documents available to our staff. Although these are not termed refusals, they come close because of the interminable delays that result from having to refer routine matters through channels to Washington.

In addition to the unnecessary cost and waste of time this involves, there is the increased risk of our making reports without being aware of significant information and the increased risk of our drawing conclusions based on only partial information.

We are seriously concerned with the increasing restrictions that have been imposed on overseas officials in particular, that take away a large measure of their discretion for dealing with GAO personnel, and we have conveyed this to the agencies.

#### INTERNATIONAL LENDING INSTITUTIONS

Beginning in the fall of 1970, we undertook to study U.S. participation in international lending institutions—the World Bank, International Development Association, Inter-American Development Bank, and Asian Development Bank. During our initial survey and in our later reviews relating to specific institutions, we encountered difficulties in obtaining information from the Treasury Department.

We experienced long delays in obtaining certain information. For example, access to monthly operations reports and to loan status reports for one of the institutions that we requested in December 1970 was not granted until August 1971 and then only after repeated requests.

We were refused access to several categories of documents by Treasury Department officials. These included the recorded minutes of the meetings of the institutions' board of directors, periodic progress reports on the status of projects being financed by the institutions, and a consultant's report on management practices of one of the institutions. Also, although Treasury officials advised us that they had refused access only to internal documents which they received in confidence from the institutions, we were refused access to certain documents which, as far as we could determine, were not documents furnished by the institutions but rather were documents prepared by U.S. officials for use by other U.S. officials.

We were not auditing the records of the Inter-American Development Bank as such but only those documents that had been provided by the Inter-American Development Bank to the Executive Director and were available for his use in the exercise of his management responsibilities. We believe that these records should have been available to us in our review which was on the U.S. system for appraising and evaluating Inter-American Development Bank projects and activities. Any report on this subject would necessarily be lacking to the extent to which information used by the United States in evaluating Bank projects was not made available to us during our examination. We see no valid basis for Treasury's refusal to provide access to the records we requested.

#### INTERNAL REVENUE SERVICE

GAO's review efforts at the Internal Revenue Service had been materially hampered, and in some cases terminated, because of the continued refusal by IRS to grant GAO access to records necessary to permit an effective review of IRS operations and activities.

Without access to necessary records, GAO cannot effectively evaluate the IRS administration of operations involving billions of dollars of annual gross revenue collections and millions of dollars in appropriated funds. Such an evaluation, we feel, would greatly assist the Congress in its review of IRS budget requests and in its appraisal of IRS operations and activities. Without such access, the management of this very important and very large agency will not be subject to any meaningful independent audit.

GAO has taken every opportunity to impress upon IRS officials that it is not interested in the identity of individual taxpayers and does not seek to superimpose its judgment upon that of IRS in individual tax cases; rather, GAO is interested in examining into individual tax transactions only for the purpose of, and in the number necessary to serve as a reasonable basis for, evaluating the effectiveness, efficiency, and economy of selected IRS operations and activities. GAO has, in general, directed its efforts toward those areas where it believed that improvements in current operations would bring about better IRS administration of programs, activities, and resources.

It is the position of IRS that no matter involving the *administration* of the internal revenue laws can be officially before GAO and therefore we have no audit responsibility. The Commissioner of IRS, in a letter to the Comptroller General dated June 6, 1968, stated:

"\* \* \* I must note that the [Chief Counsel, IRS] opinion holds that the Commissioner of Internal Revenue is barred by Sections 6406 and 8022 of the Internal Revenue Code from allowing any of your representatives to review any documents that pertain to the administration of the Internal Revenue Laws. Thus, federal tax returns and related records can be made available to you only where the matter officially before GAO does not involve administration of those laws."

Under the provisions of 26 U.S.C. 6103, tax returns are open to inspection only on order of the President and under rules and regulations prescribed by the Secretary of the Treasury or his delegate and approved by the President. Regulations appearing in 26 CFR 301.6103(a)-100-107 grant several Government agencies specific right of access to certain tax returns. Our Office is not included among those agencies. The regulation applicable to our Office, 26 CFR 301.6103(a)-1(b)(f), provides that the inspection of a return in connection with some matter officially before the head of an establishment of the Federal Government may be permitted at the discretion of the Secretary or Commissioner upon written application of the head of the establishment.

IRS has permitted Federal agencies, States, individuals, contractors, and others to have access to tax returns and records. GAO has been given access to individual tax returns only when the return is needed in connection with another matter in



which GAO is involved or when we have made reviews at the request of the Joint Committee on Internal Revenue Taxation. Otherwise we have been denied records requested for reviews of IRS operations. The reviews of IRS conducted at the request of the Joint Committee have been made pursuant to an arrangement whereby GAO and the Joint Committee agreed on certain priority matters involving the administration of the internal revenue laws. Under this arrangement we, in effect, make reviews for the Joint Committee, and we have had the complete cooperation of the Service.

#### ECONOMIC STABILIZATION PROGRAM

Another access to records problem arose when GAO attempted, pursuant to a congressional request, to review the effectiveness of IRS activities in monitoring prices. IRS did not formally deny GAO the right to review records of the Economic Stabilization Program. Rather, the General Counsel of the Treasury Department submitted a proposed "memorandum of understanding," which was to be signed by himself, the Comptroller General, and the Commissioner and Chief Counsel of IRS, as a condition precedent to permitting GAO to perform the review.

In our opinion, the memorandum of understanding would have negated GAO's independence and limited GAO's right to records to such an extent that any work undertaken would not have provided a basis to properly perform the audit. Accordingly, the General Counsel of the Treasury Department was advised that the memorandum of understanding was not acceptable to GAO. Subsequently, we advised the Treasury Department in January 1973 that, since Phase II of the Economic Stabilization Program was being phased out, there was no practical purpose in pursuing the matter.

#### FEDERAL DEPOSIT INSURANCE CORPORATION

The long and involved history of controversy between GAO and the Federal Deposit Insurance Corporation over GAO's right of access to certain of the Corporation's records appears in the published hearings of the House Committee on Banking and Currency of May 6 and 7, 1968. Those hearings resulted in the introduction of H.R. 16064, 90th Congress, a bill to amend the Federal Deposit Insurance Act with respect to the scope of audit of FDIC by GAO.

Essentially what is involved in this dispute is that although our Office is required by section 17 of the Federal Deposit Insurance Act (12 U.S.C. 1827) to conduct annual audits of the Corporation, we have been unable to fully discharge our responsibilities because FDIC has not permitted us unrestricted access to examination reports, files and other records relative to the banks which it insures.

It is the position of the Corporation that our right of access to its records is limited to those administrative or housekeeping records pertaining to its financial transaction. It is GAO's position that, because the financial condition of the Corporation is inseparably linked with the manner in which it supervised the banks which it insures, we cannot report to the Congress on the financial condition of the Corporation with evaluating the significance of its contingent insurance indemnity obligation for the banks.

At the time section 17 was being considered by the Congress, it developed that, although GAO and FDIC had agreed on the language included therein, divergent views were held by GAO and FDIC as to its meaning. Each made its position known to the House Committee on Banking and Currency, but the matter was not resolved. This difference of opinion still exists with both the Corporation and GAO feeling that the present law supports their respective positions. Repeated efforts to resolve the matter administratively have failed, and, for this reason, the Comptroller General in his testimony of March 6, 1968, before the House Banking and Currency Committee, recommended that the Federal Deposit Insurance Act be amended to specifically provide for an unrestricted access to the examination reports and related records pertaining to all insured banks.

#### EMERGENCY LOAN GUARANTEE BOARD

The Emergency Loan Guarantee Board, established by the Emergency Loan Guarantee Act (Pub. L. 92-70), through its Chairman—the Secretary of the Treasury—has taken the position that it was not the intent of the Congress in establishing the Board to grant GAO authority to review Board activities. The

Board was established to make guarantees or to make commitments to guarantee lenders against loss of principal or interest on loans to major business enterprises whose failures would seriously and adversely affect the economy or employment of the Nation or a region thereof.

GAO believes that it has the responsibility and authority to review the Board's activities including decisions of the Board in approving, executing, and administering any loan guaranteed by the Board. The Board's position, as indicated, is that there is nothing in the Emergency Loan Guarantee Act or its legislative history which would provide for a GAO review of all Board activities and that the Congress might need to pass additional legislation to make it clear that GAO has this authority. The main thrust of the Board's position is that the congressional review of loan guarantee matters is carefully spelled out in the guarantee act; GAO is directed to audit the borrower and to report its findings to the Board and to the Congress; and the Board is directed to make a "full report" of its operations to the Congress. It is our position that, as an agency of Government, the Board is clearly subject to audit examination by GAO and that the records of the Board are required to be made available to GAO under its basic authorities. Those are section 312 of the Budget and Accounting Act, 1921 (31 U.S.C. 53); section 206 of the Legislative Reorganization Act of 1946 (31 U.S.C. 60); subsections 117(a) and (b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(a), (b)); and section 204 of the Legislative Reorganization Act of 1970 (84 Stat. 1140).

It is our view that under these basic authorities GAO has responsibility for auditing the activities of the Board and thus has attending right of access to such information and documents as the Board uses in reaching its decisions. Further, it is our view that neither the failure to spell out explicitly that GAO has such responsibility and right of access nor the fact that under Pub. L. 92-70 GAO was given explicit authority to audit the borrower diminishes in any way the basic audit authorities that we rely upon.

While the records in this case were subsequently made available, the Treasury did so, however, only because of the intervention of the House and Senate Banking and Currency Committees. In making the records available, however, the Executive Director of the Board stated that "we continue to believe that the GAO does not have the statutory authority to review the Board's internal records relating to its decisionmaking process." The Board supported this position in its first Annual Report of July 31, 1972.

#### COUNTERVAILING DUTY STATUTE

In 1971, pursuant to a congressional request, GAO sought to review the Department of the Treasury's administration of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), which requires the Secretary of the Treasury to levy a countervailing duty on any dutiable product imported into the United States for which the producing nation has provided a production or export grant or bounty.

In January 1973, we decided that our efforts to obtain the necessary records to make the review were unsuccessful.

#### EXCHANGE STABILIZATION FUND

By Public Law 91-599, approved December 30, 1970, the Congress directed that the administrative expenses of the Exchange Stabilization Fund, established by section 10 of the Gold Reserve Act of 1934, be audited by the General Accounting Office and provided certain access to records authority. The legislative history made it clear that the audit should start with fiscal year 1972, and the GAO started efforts to obtain access in the Spring of 1972. After a long period of refusals and delays, the Treasury Department finally agreed in March 1973 to provide GAO access to all financial records and relevant supporting information on the administrative expenses of the Exchange Stabilization Fund for 1972. The audit has been started.

#### CORPORATION FOR PUBLIC BROADCASTING

The Public Broadcasting Act of 1967 provides that the Public Broadcasting Corporation shall be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. In attempting to comply with our responsibility



under this Act, we have requested such documents as minutes of the meetings of the Board of Directors and files relating to a long-term lease for office space entered into by the Corporation. In both instances we were initially denied access to this data. Subsequently, this information was made available to us and enabled us to more properly evaluate certain operations of the Corporation.

On August 10, 1972, an internal Corporation memorandum advised Corporation officials that if GAO wished "to examine documents setting forth policies or procedures or to pursue a detailed examination of how decisionmaking takes place or analyzing program expenditures to determine the proportion received by various recipients or any of a variety of tasks they might pursue along this line, I believe you should simply state you feel such requests are beyond the scope of their activity and that you decline to pursue the matter with them." On August 22, 1972, the Comptroller General advised the Acting President of the Corporation that the GAO's responsibility for auditing the Corporation included audits which could lead to an identification of needed management improvements together with suggestions as to courses of action which should be considered to correct management deficiencies or otherwise strengthen the management of the Corporation.

Although we have had no written reply to the August 22 letter, the Acting President of the Corporation advised us orally on September 25, 1972, that the Board of Directors and its Chairman felt that it was not clear as to our right of access to information of other than a financial nature. Since that date we have not been formally refused information necessary to perform our work although we have had some difficulty in obtaining needed data in a timely manner.

Senator MUSKIE. As I said, we appreciate your very useful testimony this morning. It gives us some of the nuts and bolts, the practical implications on restrictions on the flow of information from the Executive to the Congress, which I think is a useful addition to the record.

I see we have a new phrase in the language now, "agency privilege," and I suppose we ought to consider whether or not we need to define that in statutory language in order to control it. Everybody wants privileges, all ignoring the rights of others to receive information.

In your testimony, Mr. Staats, and in your attachment I believe you do not refer to John Dean's recent refusal to let the GAO see the records concerning the use of Air Force planes in the 1972 Presidential campaign. So I wonder if you might, when your inquiry is completed, submit a summary of the incidents for this hearing record.

Mr. STAATS. We would be very glad to do that, Mr. Chairman. We would also be happy to include the correspondence we have had in connection with this matter.

Senator MUSKIE. Have you reached the end of the line on the incident?

Mr. STAATS. I believe that we have. The information that we sought, we have obtained in part.

[The material referred to above, in the form of a letter from the General Accounting Office to Senator William Proxmire, dated April 13, 1973, appears in the Appendix, Volume III of these hearings, Executive Privilege, Part 6, Miscellaneous Background.]

Senator MUSKIE. Could you give us the basic outline of the problem?

Mr. STAATS. Yes, the information we sought—and this was at the request of Members of Congress—essentially was the trips taken by the President and his family and his staff, the Vice President, and Cabinet officers during the course of the campaign, and which trips were paid for by the Finance Committee To Re-elect the President. As you know, the traditional practice over many years has been that when the President uses Air Force aircraft for that purpose, he reimburses the Federal Government on a regularly scheduled billing basis for

those trips. Where he is using aircraft for official purposes, that reimbursement does not take place.

The purpose of the inquiry was to find out whether there had been full reimbursement for the political use of aircraft as contrasted with the official use of aircraft.

We sought that information from the White House, and in a letter which we received from Mr. Dean, we were told that that information was privileged information and would not be made available to us. We had already, of course, in the General Accounting Office, under our responsibilities under the Federal Elections Campaign Act, a record of expenditures which were recorded by the Committee To Re-Elect the President. These records indicated that the expenditures were considered political in nature and, therefore, reimbursement made to the Department of Defense. What we were not able to supply was the information with respect to the total number of trips and the number of passengers. In other words, we were unable to make a separate judgment as to whether or not all of the reports filed with our office were accurate and full reports.

Senator MUSKIE. As I understand, then, they took the position that they would inform you as to the number, as to what trips were political and simply decided for themselves what they owe to the Government.

Mr. STAATS. That is correct.

Senator MUSKIE. And they refused to give you information as to the number of trips, and what kind of trips. Do you have Mr. Dean's letter?

Mr. STAATS. Normally in the past, in previous campaigns, the Department of Defense or the White House has been willing to provide information such as manifests of passenger lists and point-to-point designations. That was what we were seeking, and that was the information that was denied to us.

Senator CHILES. Mr. Chairman—

Senator MUSKIE. Well, as I understand it, Mr. Dean in reply to your request stated :

Information of this nature has traditionally been considered personal to the President and thus not the proper subject of congressional inquiry. All political flights made during September were billed to the Committee to Re-Elect the President, and that data will, of course, be reflected in the committee's financial reports.

Now, has it been traditional to deny you information of this kind?

Mr. STAATS. This information, it is my understanding, has been made available on request to the Congress in previous campaigns. I would have to check to be certain that that was done in every case, but to my knowledge, Mr. Chairman, this information has been made available, at least concerning a number of cases with which I am personally familiar in previous administrations.

The entire paragraph from the letter that Mr. Dean wrote to me on November 20, which is pertinent here, says :

With regard to your request for campaign manifest data concerning Presidential flights made during the month of September of 1972, I must advise you that information of this nature has traditionally been considered personal to the President and thus not the proper subject of congressional inquiry. All political flights made during September were billed to the Committee To Re-Elect the President, and that data will, of course, be reflected in the financial reports.



Those reports are filed with our Office of Federal Elections.

Senator MUSKIE. But you can't remember previous refusals to provide similar information to you or to the Congress?

Mr. STAATS. I cannot.

Senator MUSKIE. Senator Chiles?

Senator CHILES. I just wanted to ask one question. Do you consider that letter an invocation of Presidential privilege under the memorandums as set forth?

Mr. STAATS. Under a literal reading of the 1969 memorandums to which I referred, I interpret the 1969 statement to mean that only the President, personally, can invoke executive privilege under the ground rules laid out by him. So if you were to look at this literally, and particularly as against that 1969 directive, this case could not be considered an exercise of executive privilege. However, the net effect is the same, which is to deny it on the grounds that, as he said, it has been traditionally considered personal to the President and not the proper subject of congressional inquiry.

Senator CHILES. And then the GAO has no further recourse left?

Mr. STAATS. No, sir, we do not.

Senator CHILES. No recourse presently to try to obtain this information?

Mr. STAATS. No, sir.

Senator CHILES. Is there any other area in which you can accept a statement that "We have filed a report on this under the Campaign Reporting Act," and that is it? I mean, what if I did that on my campaign expenses? What if I just said I filed a report on that?

Mr. STAATS. I don't think that would be acceptable.

Senator CHILES. I don't either.

But according to your statement, you would like to see an opportunity to get a declaratory decree in a civil case on that.

Mr. STAATS. I'm thinking here now solely and specifically from the standpoint of the General Accounting Office. We believe that the language that we have suggested has a number of practical advantages in that we believe if the three-judge district court agreed with our interpretation of the law and found that we had a legal right to the records, we think in most cases that would be adequate to dislodge the information we need.

We think this would be quick and generally effective. However, absent an action following a favorable decision by the district court, we believe that then we should advise the Congress in some formal way, being an arm of the Congress, to permit the Congress to act if it so chooses. Again, this would be within a time frame. Absent action by the Congress, we would have the authority to deny the agency funds. In other words, we would have the authority to take exceptions to payments made from a specified date, unless the record would be made available to us.

We see practical advantages in terms of shortening up the time period. It allows the judiciary to make the initial resolution, and it would enable the Congress to exercise judgment. If they felt we were not entitled to the information for any reason, they could make the judgment; but absent that, we would take enforcement action against the agency.

Senator CHILES. I have no further questions.

Senator MUSKIE. I should have yielded to Senator Ervin first.

Senator ERVIN. I have no questions, but I would like to reiterate that as a result of the study which the Subcommittee on Separation of Powers made with respect to executive privilege in 1971, and as a result of the study since that time, I think there is reason to infer from the Constitution, although not expressed in the Constitution, that the President has the power to keep secret confidential communications occurring between the President and advisers, and confidential communications occurring among his advisers, which are had for the purpose of assisting the President to carry out in a lawful manner the obligations imposed upon him by the Constitution and the obligations imposed upon him by acts of Congress. That is the sum total in my judgment of the extent and scope of what is popularly called the executive privilege.

It manifestly does not cover wrongdoing, either illegal acts or unethical acts; and it manifestly does not cover any transactions which are not official in character, and it manifestly does not embrace a power on the part of the Executive to withhold from Congress information collected at the expense of the taxpayers, which information is necessary to enable the Congress to exercise in a knowledgeable fashion, its legislative duties.

I make these observations for the record, and I would also like to take this occasion to compliment Mr. Staats and the General Accounting Office for what I conceive to be a very magnificent job that they do in attempting to carry out the functions imposed upon them by the Congress.

Mr. STAATS. I thank you very much for that statement. Along with your comment, I would simply like to emphasize a point I made in my statement that we encounter quite frequently, the position taken in the agencies that we are attempting to obtain confidential communications between subordinates and agency heads, or between agencies and the President. We have made it abundantly clear in all of our work that our concern is not with that information. We are not trying to scoop them, and we are not trying to prejudge the outcome. What we are interested in is the process by which decisions are made. We are interested in the information so as to be able to make an analysis and an evaluation and a judgment as to the adequacy of the processes and the machinery, the effectiveness with which these programs are carried out, how decisions are reached, and whether an adequate basis lies behind those kinds of decisions.

So I don't believe you will find in any of our work in the General Accounting Office, any case where we have revealed the information, or where we have tried to make evaluations prior to the time those decisions are reached by the appropriate authorities.

I think your point is a very important one, and it particularly applies to our operation.

Senator MUSKIE. Mr. Staats, I would like to ask specifically that we put in the record, or that you put in the record, your letters to the White House requesting the manifest on the trip that you referred to earlier, or the trips, and also the reply of Mr. Dean.

Mr. STAATS. I would be very pleased to do that.

Senator ERVIN. I have copies of them here, Mr. Chairman. I can put these in. I don't know whether Mr. Staats can identify these Xeroxed copies, but you might look at these and see if these are the



copies of your letters requesting this information and whether this is the copy of the reply of Mr. Dean?

Mr. STAATS. Yes; that looks like the letters.

Senator ERVIN. I would suggest then we put those in the record.

Senator MUSKIE. Without objection.

[The material referred to above follows:]

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D.C., October 31, 1972.

Hon. H. R. HALDEMAN,  
Assistant to the President,  
The White House.

DEAR MR. HALDEMAN: The General Accounting Office has been requested by a member of the Congress to examine records concerning flights made in September 1972 by the President and his family, the Vice President, White House staff, and Cabinet officers in aircraft assigned to the 89th Military Airlift Wing, Andrews Air Force Base, Maryland, and the extent to which the United States Government has been reimbursed by the Committee to Re-Elect the President for these flights. The records to be examined include passenger manifests and flight logs which are on file at the Office of the Military Assistant to the President.

We shall appreciate your administratively arranging for those records to be furnished to us by Thursday morning, November 2, 1972.

The examination will be under the overall direction of Mr. Henry W. Conner, Associate Director, Logistics and Communications Division. The GAO staff members who will perform the examination are Mr. George L. Egan, Assistant Director, and Messrs. George H. DeLorme Jr., and David A. Brinkman. Since we do not know the volume of records which are involved, we cannot precisely estimate the time the examination will take. We do not anticipate, however, it will exceed one week.

Please advise Mr. Conner (Code 129 extension 3407) as soon as the records are available for our examination.

Sincerely yours,

(Signed) ELMER B. STAATS,  
Comptroller General of the United States.

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THE WHITE HOUSE,  
Washington, November 20, 1972.

Hon. ELMER B. STAATS,  
Comptroller General of the United States,  
Washington, D.C.

DEAR MR. STAATS: This is in response to your letters of October 31, 1972 and November 1, 1972 to Mr. H. R. Haldeman requesting permission to examine certain records and documents.

Please be advised that the account records for the Executive Office of the President for the period of fiscal year 1969 to the present are available for review by the General Accounting Office, as authorized by sections 53 and 71, Title 31 of the United States Code. Noble Melencamp, Chief Executive Clerk (456-2594) has been instructed to make these records available at your convenience, and should be contacted to make the necessary arrangements.

With regard to your request to examine manifest data concerning Presidential flights made during the month of September 1972, I must advise you that information of this nature has traditionally been considered personal to the President and thus not the proper subject of Congressional inquiry. All political flights made during September were billed to the Committee To Re-Elect the President, and that data will, of course, be reflected in the Committee's financial reports.

With kind regards,  
Sincerely,

JOHN W. DEAN III.  
Counsel to the President.

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Senator ERVIN. I would like to call the attention of the committee to Title V, Section 2954 of the U.S. Code, which reads as follows:

An Executive agency on request of the Committee of Government Operations of the House of Representatives or of any seven members thereof or on request of the Committee on Government Operations of the Senate or any five members thereof shall submit any information requested of it relating to any matter within the jurisdiction of the Committee.

That seems to be very plain, unambiguous language, and it seems to me that since the Government Operations Committee of the Senate is expressly empowered by the Reorganization Act to conduct investigations, looking to discovery of corruption or inefficiency in Government, that the Government Operations Committee would have the power under this statute to require the production of the information requested in Mr. Staats's letter. I would like to know if it would help the GAO in the discharge of its duties for the Government Operations Committee to request such information under this statute.

Mr. STAATS. I have not given thought to this, but my feeling would be to say "Yes." I could think about it a little bit more, Senator Ervin, and give you my more specific response, but my general reaction would be, yes, it would be helpful.

Senator ERVIN. I can understand why it is not quite fair suddenly to ask you to express a final opinion on this point since you have had no opportunity to give attention to that.

Mr. STAATS. Mr. Chairman, I have not taken the time of the committee to go into the attachment to my statement, but I bring it to your attention only by way of saying that we have attempted to follow the policy which Senator Stevenson so well stated here this morning of trying to work out these problems on a case-by-case basis. We have tried to assure the agencies, in all cases, of our desire to be fair, accurate, and impartial about our findings, but there has been increasing difficulty. That is why we have prepared the draft legislation which I have included in this statement. This draft is not something that we have put together quickly or hurriedly. It is something we have been considering over a period of the past year or so as possibly necessary. We had hoped we would not have to submit legislation, but we have come to the conclusion that this may be important for us to do our duty.

Senator MUSKIE. The attachment, just to make the point clear for those who might not be aware of it, deals with the resistance you have experienced in getting information to which you are entitled pursuant to the duties imposed upon you by the Congress.

Mr. STAATS. That is correct.

Senator ERVIN. Mr. Chairman, if I may, I would like to say that in my judgment Congress has the full constitutional authority to enact Title V, Section 2954 of the U.S. Code, and also has full authority and power to enact the statutes that have been recommended under Section 8 of the First Article of the Constitution. This expressly gives the Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and also other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." In other words, Congress has the power to enact the statutes, to carry out all provisions of the Constitution and specially to carry out, to regulate the conduct of people who exercise governmental authority under the Constitution.

Senator MUSKIE. Senator Chiles?



Senator CHILES. I am concerned about that portion of your testimony in which you talk about not the direct refusal but the slowdown of the process wherein other people have to purify the records, or screen the records, before you can be granted them.

In the Appropriations Committee and in the Foreign Operations Subcommittee you testified before us the other day and testified you have had considerable difficulty in foreign assistance in trying to check into foreign assistance because of this process. I am tremendously concerned about that because right now we have a controversy that has public attention, and for the first time we seem to have created public attention and concern, but certainly Senator Ervin has been working on this issue for many years and there was no attention. Senator Fulbright has been tremendously concerned with it. Our office has been facing these problems. And what happens after this particular attention span is over concerns me especially with the slowdown process because I do think it has handicapped the job that you can do and it handicaps the information that Congress is going to receive. Perhaps the legislation that you have suggested could be helpful, even with that we have this slowdown process. I mean, we have to have more comity or it still won't be resolved because we will still have this slowdown process holding things back.

I think you did receive some results in the Treasury case and the Lockheed case primarily because the committees of the House and the Senate did get involved and I think that you really need to make this information available readily to the Congress and speedily when there is a slowdown, so perhaps we can do something about it. I am looking forward to talking with the people in the foreign assistance field of the executive branch when they come before the Foreign Operations Committee for their budget because of the policy of this slowdown that appears to be involved in this thing and I think we should be able to call this to the attention of the Defense Department and every other Department, the Treasury and others.

For I think we need to adopt some kind of a means of communication or of reporting this to the Congress even in these matters of not an outright refusal, but where there is a delay and especially where your Department feels that that delay goes beyond what a reasonable time should be and it is delaying your effectiveness and efficiency. Because when we talk about some of this legislation, we are talking about penalizing your agency if there is a delay and, if this delay is caused by others, we certainly need to know about it.

Mr. STAATS. I agree with you that it is very important that we keep the committees advised of our difficulties and problems. In the case of the Lockheed guarantee audit, I am sure we would not have gotten the information without the help of the Banking and Currency Committees. But we find other cases where we have been able to bring this to the attention of the committees, and the committees have been busy on other things and this may not have as high a priority as the other things on the committee's schedule so this has not always worked out. I would have to be frank with you in saying that.

Senator CHILES. Yes.

Mr. STAATS. We have been disappointed in some cases because we have not had more attention from the committees, so I welcome very

much what you say, and I would hope that we would have that kind of support.

Senator CHILES. I think right now you have our attention on this and maybe if we can set up a process of reporting on this, that will solve the problem.

Mr. STAATS. I think the attachment we have here, Senator Chiles, plus the other data we supplied to the committee at its request is a pretty good inventory of all of our problems that we have had with the executive branch on access to information. Some of these are areas where there are legal arguments. That is true with the case of Internal Revenue Service, and that is true with the case of the Federal Deposit Insurance Corporation. We do have a legal argument which has been made which we have not been able to resolve and, frankly, we have not been able to get Congress to resolve it although we have recommended that they do so.

Senator CHILES. Thank you.

Senator MUSKIE. Thank you very much, Mr. Staats.

We have an unexpected witness this morning, Congressman John Anderson of Illinois, who has had a longstanding interest in this subject and following yesterday's hearings expressed an interest in testifying briefly this morning.

It is a pleasure to greet the distinguished Congressman from the other branch of the Congress and we welcome his testimony.

Senator ERVIN. I regret I have to leave because I have another hearing that starts at 12 noon. I am very sorry I will not be able to hear Mr. Anderson testify, but I will read his statement carefully. I particularly regret missing this testimony because I have a high degree of respect for him and the fine service he has given our country.

#### STATEMENT OF HON. JOHN B. ANDERSON, A REPRESENTATIVE IN CONGRESS FROM THE 16TH CONGRESSIONAL DISTRICT OF THE STATE OF ILLINOIS

Mr. ANDERSON. Thank you, Mr. Chairman. I appreciate very much the opportunity to appear before this distinguished subcommittee, and I will be very brief in my remarks.

Frankly I feel in a sense that my presence before this group this morning has almost been compelled by the account that I have seen of the answers that were given yesterday by the Attorney General of the United States in response to interrogation by members of this subcommittee which seem to me to represent a truly alarming extension of any notion that I have of legitimate limits of executive privilege.

Up to this point I have not been inclined to take an overly restrictive view of executive privilege. It seemed to me quite reasonable to believe that there were many circumstances under which the Executive should enjoy that privilege and enjoy that degree of confidentiality that he must have with his assistants, with his aides, with respect to matters involving national security, with respect to matters involving policy decisions, on questions of broad public interest.

But I feel compelled, as I have said, to stress before this subcommittee this morning my complete shock and dismay at some of the answers that were placed in the record here yesterday. I feel that they cannot go un rebutted before this subcommittee because, if my under-



standing is correct, and I am sure it is, he seeks to extend this doctrine to every one of the more than 21½ million employees of the executive branch. And the further suggestion was made that the only remedies then available would be remedies of impeachment or of cutting off the funds from the executive branch. I think I must answer to that.

In the prepared statement the Attorney General delivered, he said, "executive privilege is squarely founded in the separation of powers doctrine," and, of course, what he did not go on to say, but what I think is completely implicit in that doctrine of separation of powers, is that we do have three coequal and I would stress independent branches of Government and, therefore, the extension of the doctrine offered yesterday by the Attorney General was not only unnecessarily provocative and indeed even contemptuous of the Congress, but more importantly I think it contained a kind of expansion of the doctrine of executive privilege that puts upon this subcommittee and indeed upon the Congress the responsibility now of legislating in such a way that we do not permanently rupture the delicate balance that ought to exist between the two branches of Government.

I would have hoped that this was a question that could have been resolved after very deliberate and searching examination by the Congress and after some kind of communication and consultation with the Executive, but it seems to me that the Attorney General has literally thrown down the gauntlet to the Congress in what he said yesterday and that, therefore, we may have to move with greater expedition than we might otherwise have deemed necessary. And I would ask whether or not the chief lawyer of the U.S. Government has ever heard of the Freedom of Information Act. It certainly was not reflected yesterday that he had any knowledge of that act. That was not reflected in the statement he delivered before this subcommittee, because that act requires that certain information be disclosed, that knowledge and information be disclosed to the general public. And now it would seem to me from my reading of his remarks that he has suggested that the President can literally unilaterally deny to the Congress information that the Freedom of Information Act says has to be made available to the general public and let alone Members of Congress. So what we are seeing in the statement by the Attorney General I fear is an assertion that the Federal Government is not composed of three coequal branches.

And I suggest again if the rationale for the doctrine of executive privilege is indeed the doctrine of separation of powers, we must not forget the other facet of that doctrine, which is that we do have coequal branches. And let me say, Mr. Chairman, in concluding, that I make the observations that I have just made not without sorrow because I agree with what our distinguished colleague, Senator Mathias, said yesterday in response to the testimony that I have averted to that as the element of goodwill between the executive and the Congress evaporates, it is replaced by the debilitating tendency for confrontation. And if there is one thing I don't think we need at this time it is a continuation or the politics of confrontation. Therefore, to reassert the proper balance between the two branches, I would want to go on the record this morning as urging the appropriate committees of the Senate and the House to report legislation that would, one, strictly limit the right of executive privilege to those

direct, personal, and confidential relationships between the President and his chief advisers on matters involving national security and other broad-ranging public policy decisions; and, second, that that privilege may be invoked only through written notice to the Congress by the Chief Executive.

Thank you, Mr. Chairman.

[The prepared statement of Hon. John B. Anderson follows:]

PREPARED STATEMENT OF CONGRESSMAN JOHN B. ANDERSON

Mr. Chairman, until the present I have not been inclined to take an overly restrictive view of executive privilege. It seemed to me quite reasonable to allow the President to enjoy confidential relations with his direct advisers regarding matters of national security. But I feel compelled to stress before this committee today in the strongest terms possible my utter shock and dismay at the testimony presented yesterday by Attorney General Kleindienst. His statement was not only unnecessarily provocative and contemptuous of the Congress, but, more importantly, it contained such an alarming and dangerous expansion of the notion of executive privilege, that I can see only one course of action: Congress must immediately pass legislation strictly limiting executive privilege lest the delicate balance of shared power between the two branches be ruptured permanently.

One would have hoped that the executive privilege issue could have been resolved only after very deliberate and searching examination by the Congress, and after some kind of communication and consultation with the Executive. But in my view there is no longer time for that: the Attorney General has thrown down the gauntlet; if this Congress is to preserve even a semblance of integrity and independence, it must act immediately to nullify the sweeping claim of executive power asserted by the Attorney General.

I must ask whether or not the Chief Lawyer of the government has ever heard of the Freedom of Information Act. If he has, it certainly was not reflected in his statement yesterday. That act requires disclosing to the *general public*, information that the Attorney General has now said the President could unilaterally deny even to Congress. That proposition is simply incredible and, I might add, borders on contempt for the established law of the land.

What we are seeing here is an assertion that the federal government is not composed of three co-equal branches, as the Constitution ordains, but of one dominant branch, the Executive, with the authority to establish its own policies in utter disregard for the constitutionally mandated rights and responsibilities of Congress. Unless the Congress acts to prevent such a move, we will be in dereliction of our responsibilities as the principal lawmaking body of the nation.

I make these observations with deep sorrow for I agree with what our distinguished colleague, Senator Mathias, said yesterday in response to Mr. Kleindienst's testimony. As the element of goodwill between the Executive and Congress evaporates, it is replaced by the debilitating tendency for confrontation. To reassert the proper balance between the two branches, I urge the appropriate committees to report, as soon as possible, legislation that would:

(1) Strictly limit the right of executive privilege to direct, personal and confidential relationships between the President and his chief advisers on matters involving the national security and other public policy decisions; and

(2) Require that executive privilege may be invoked only through written notice to the Congress by the Chief Executive.

Senator MUSKIE. Thank you, Congressman Anderson, and may I compliment you on a thoughtful and impressive statement. I think it speaks for itself. I am sure you didn't find it easy to come in here this morning and say it and I think that your saying it makes the substance of what you say so much more significant and creditable than when some of the rest of us say it. You are, after all, on the other side of the party line, and it is not always easy to pierce partisanship to get to the substance of what it is we disagree about.

However, your coming in this morning I think is a great service to the country.



Mr. ANDERSON. I appreciate very much the very kind words you have expressed. I might add one other point. I have carefully read the statement that was issued by the Office of the White House Press Secretary, the statement by the President on March 12, 1973,<sup>1</sup> which was a statement on the very issue that we are discussing at these hearings, and what particularly disturbs me is that in one paragraph of that statement it is said, "That executive privilege will not be invoked until the compelling need for its exercise has been clearly demonstrated and the request has been approved first by the Attorney General and then by the President." That is what worries me; if the Attorney General is going to be advising the President of the United States on this very important question and if he is going to use the kind of rationale to make his recommendation that he employed before this subcommittee yesterday, I am doubly disturbed about the potential abuse of this whether by this President or any other President of this particular power.

Senator MUSKIE. You know I have a notion that maybe in some respects, as I said earlier, the Attorney General may have been flying by the seat of his pants—and he ought to buy a new pair if that is the case—but it may be that he was not and I would like to call your attention—and I am not going to get into any exhaustive questioning here because you have made your statement and I respect you for that—to the President's definition of executive privilege in his March 12 statement. There is this contained in it—do you have that before you?

Mr. ANDERSON. I have the statement before me.

Senator MUSKIE. On page 3, the last paragraph, there is a statement that disturbs me, and I simply want to get your reaction to it in the light of what you said:

Under the doctrine of separation of powers the manner in which the President personally exercises his defined executive powers is not subject to questioning by another branch of Government. If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned for their roles are in effect an extension of the President's."

And it seems to me that what the Attorney General had to say yesterday about the limitations on the impeachment powers of the Congress may stem in part from that paragraph. So what is in question, if I am correct, is not just the definition of the doctrine as the Attorney General stated it yesterday, but even the President's definition of the doctrine as contained in the March 12 statement.

Mr. ANDERSON. I would agree with you on the observation that you have just made. It seems to me that it represents an extension of the parameters of this doctrine to completely impermissible limits.

Senator MUSKIE. Thank you very much. Senator CHILES?

Senator CHILES. Congressman, I just want to say that I find your statement very reassuring to me. When I left this hearing room yesterday and as I was walking down the hall, I was beginning to wonder if it was just me, that is, the statement of the Attorney General was so unreal to me that I just couldn't understand whether I had either heard it wrong or I had so alarmed myself, that that was unreal. Your concern reassures me that I did in fact hear it correctly and I haven't parted from my senses and the concern that I have about the extension that his statement represented is real.

<sup>1</sup> See Appendix, Volume III of these hearings, Executive Privilege, Part 2, Presidential and Administration Statements.

He had stated that he felt that the Constitution was divinely inspired and I take no issue with that. I feel there has to be divine inspiration and it came through in the writings, but when he extended that to say that the President's power was so completely unlimited that he exercised sole judgment in all of these questions, then somehow divine right came through to me and maybe that kind of belief is now manufacturing all these statements that we are now seeing.

Mr. ANDERSON. I certainly do not prescribe to any political theology that would give any officer of the Government divine rights.

Senator MUSKIE. Thank you very much, Congressman Anderson.

Next we have two witnesses remaining. I must say in advance that I have a commitment at 12:30, but I understand that Senator Chiles will remain so that the hearing may be completed this morning. I would like to express my appreciation to both of these witnesses and hope I can hear at least part of both of the statements.

The first is Mr. David Cohen, vice president of Common Cause.

**STATEMENT OF DAVID COHEN, VICE PRESIDENT, COMMON CAUSE,  
ACCOMPANIED BY ROBERT GALLAMORE, DIRECTOR OF POLICY  
DEVELOPMENT FOR COMMON CAUSE, AND PAT KEEFER,  
LOBBYIST**

Mr. COHEN. Mr. Chairman, thank you for inviting Common Cause to testify. In the interest of time and fairness, I will be as brief as possible and would ask that my statement be submitted for the record and I would like to summarize it.

Senator MUSKIE. Without objection, so ordered.

[The prepared statement of Mr. Cohen follows:]

**PREPARED STATEMENT OF DAVID COHEN**

Mr. Chairman and Members of the Committee, my name is David Cohen. I serve as Vice President and Director of Field Operations for Common Cause, a citizen's organization of more than 200,000 members throughout the 50 States. I thank the Committee for allowing Common Cause time to testify. Our organization was founded in September, 1970, and since that time we have been involved in a number of issues but our prime focus is a concentration on those issues that open up the governmental and political system. The public's right to know is fundamental to all responsible and effective citizen participation in government affairs: namely, the necessity of having access to information about governmental decisions and activities.

James Madison was well aware of the significance of this issue when he wrote:

"Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

These words have been quoted often in relation to freedom of information, and today they are more pertinent than ever. Information is power. Secrecy is used with increasing frequency as the means of keeping those in power isolated from the public. The public good depends on its ability to hold government officials accountable for what they do. Yet these officials cannot be held accountable if information about their activities is withheld from the public. Nor is the public inclined to probe when it is kept ignorant of important governmental matters. Secrecy undermines the public's ability to participate responsibly in the political process, thus threatening, as Madison warned, to make a mockery of popular government.

The secrecy issue today not only involves public access to information about government affairs, it also involves Congressional access to information held by the Executive branch. There are certain things the Congress has a "right to



know" in order to carry out basic constitutional functions such as control over the Federal budget, evaluation of the nation's defense posture and military commitments, and the ability to check the exercise of excessive executive power. Yet our recent history shows that the Congress has experienced increased difficulty in getting from the executive the information it needs to perform these functions responsibly. Both executive privilege and the classification system have been used by the executive to conceal from Congress, and the general public, information which it does not want to disclose.

The problem of secrecy in government has become a national disgrace, all the more so because it is not recognized as such by those responsible for it. Many have come to accept it as a fact of American politics. Yet, as mentioned above, it has seriously weakened the power of the public to influence governmental decisions and the ability of Congress to function effectively. It has also eroded citizen confidence in governmental institutions and processes. The public is naturally suspicious of decisions made behind closed doors and the volumes of documents stamped with secrecy code words that are more fitting for a spy movie. In these ways secrecy in government distorts and undermines the political process. And over the last year the problem has emerged with new force, either in the form of old practices which have worsened or in the form of new assaults on the public's and Congress's right to know.

The categories of abuses are numerous: misuse of executive privilege; executive secrecy in budget formation accompanied by either withholding critical information or providing misleading information; the maintenance of secret committee mark-ups in most Senate committees and in the House Appropriations Committee practice; massive lobbying of the Executive branch, regulatory agencies, and Congress that remains hidden from the public view; a Supreme Court proposal to change the rules of evidence in a way that could further tighten the government's hold on certain information; Executive branch passion to over-classify; and serious weaknesses in the Freedom of Information Act.

Each of our governmental institutions has contributed to this sorry state of affairs. The Congress and the Courts must accept their share of the responsibility. On all counts the public loses. Too often no information is forthcoming; other times the information is so incomplete that it obfuscates the real issues.

Only a determined Congress that has the energy and stamina to establish a coherent and enforceable affirmative anti-secrecy policy will correct the present imbalance. This will require major breakthroughs in legislation. It will equally require a willingness by Congressional committees to use the oversight function consistently. Oversight must apply regardless of who controls the Congress and who controls the Executive Branch.

#### EXECUTIVE PRIVILEGE

In recent months we have witnessed a use of executive privilege by President Nixon which is unparalleled in American history. A study conducted by the Library of Congress has found that the President has claimed an executive privilege to withhold certain information from Congress in 19 instances since he took office. He would have us believe that the precedent for this had been clearly established. But the privilege has not, contrary to the President's statement of March 12, "been recognized and utilized by our Presidents for almost 200 years." Claims of executive privilege were almost non-existent before the period of the McCarthy investigations of the early 1950's when Presidents Truman and Eisenhower sought to protect administration officials from testifying before Congress. And the first formal claim of an absolute unreviewable privilege to withhold from Congress whatever the President chooses dates from a 1958 memorandum to President Eisenhower written by former Attorney General Rogers. Mr. Nixon's unprecedented use of the privilege further contributes to altering the balance of power between the legislative and executive branch. For when information is withheld from Congress, power is withheld. And when power is taken from Congress, its ability to govern effectively is damaged. Executive secrecy destroys public confidence in government. America is the loser.

#### BUDGETARY SECRECY

The problems of secrecy which surround the Federal budget continue to thwart the public's ability to properly evaluate government expenditures and national priorities. Since vital information is withheld from Congress, this ac-

tion by the Executive mocks Congress's most significant power; control over the national budget.

To begin with, government agencies and departments draw up their budgets in the virtual absence of any public input or evaluation. The budget-making *process* is thus shrouded in secrecy from the very beginning.

Second, it has been difficult for the public and Congress to obtain information about impounded funds. We have learned recently that President Nixon has impounded over \$44 billion since 1969. Yet much of this was done without the courtesy even of a report to Congress—until legislation and repeated requests for details dragged the information out of the OMB. Until then, it had been almost impossible for Congress to ascertain which funds it had appropriated were simply not being spent. Even now, quibbles about what constitutes "impoundment" mean that the President's impoundment list is billions short of the actual unused funds.

A third problem relates to reprogramming. Agencies have been able to shift appropriated funds among programs with no notice given to anyone in Congress outside senior subcommittee members. Most Congressmen and Senators are simply unable to learn of, let alone vote on, these moves. For example, defense reprogramming in fiscal 1971 involved 132 transfers totaling \$3.3 billion!

Fourth, an agency's or office's budget justifications are sometimes withheld from public inspection. Some agencies have recently received a request from Common Cause to study these documents, and while many have cooperated, others have simply not responded or refused to comply. I will return to this matter toward the end of my remarks.

The final example of budgetary secrecy is perhaps the most outrageous; namely, the absence of a tax expenditure budget as part of the Federal budget document. It has been estimated that the government "spends", through tax subsidies and preferences, as much as \$77 billion a year. Yet how this colossal sum is being spent, and who its main beneficiaries are, are hidden from the public's view. Consequently, the public really has no honest picture of how their tax dollars are being spent.

#### CONGRESSIONAL SECRECY

Still another area where secrecy in government continues to degrade the democratic process pertains to Congressional committee meetings. Despite the Legislative Reorganization Act of 1970 which aimed at part in opening such proceedings to the public, 40% of Congressional committee sessions were held behind closed doors in 1972. And the worst offenders continued to be the committees where some of the most significant decisions are made: The House Ways and Means Committee held 63% of its meetings in secret session last year, and the Senate Finance Committee closed 77% of its meetings. The tax laws passed by these committees continue to distort tax equity—the few benefit at the expense of the many—a fact not unrelated to the absence of public scrutiny over their decisions. Party caucuses are even more secret than are the committees. The caucuses decide many matters which can affect the course of legislation, such as selecting committee chairmen and the party leadership, and setting procedural rules. These issues are the public's business, yet the public only sees the outcome, not the individual votes which produced it.

The House of Representatives took a giant step when it adopted as part of its rules a presumption that all committee meetings will be open unless a separate recorded vote is taken to close them to the public and press. The rule is working. House Committee markups have been open so far except for the House Appropriations Committee. The Committee is clinging arrogantly to secrecy while at the same time groping to understand the Federal Budget. When it comes to the expenditure of the public's money the Committee should do its business in public. By closing its mark-ups on Legislative Appropriations—a thoroughly non-controversial matter entirely unrelated to our national security—the committee is confessing its lack of seriousness in getting information from the Executive Branch and sharing it with the public. It represents a serious blow to Congress' attempt to combat the arbitrary impoundment of funds by the Executive Branch. This is further compounded by Chairman Mahon indicating that committee secrecy on *all* mark-ups, including impoundments, is standard operating procedure.

We applaud the moves by the Senate Banking, Housing and Urban Affairs Committee and the Senate Interior Committee in opening its doors to the public. This should be the rule in the Senate and should be changed in the next Congress. In the meantime, we urge individual Senate Committees to open mark-ups. Such



action would help the constitutional fight for obtaining information and would restore their proper credibility with the public and press.

#### LOBBYING

The problem of secrecy is also seen in the extensive lobbying efforts of special interest groups. Here too the proper functioning of representative government is threatened. The Supreme Court ruled in 1954 (*U.S. v. Harris*) that Congress had the right to complete disclosure of lobbying activities. Speaking of the right of the lobbyist "to petition the government for a redress of grievances," Chief Justice Earl Warren wrote in reporting the majority opinion:

"Full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment."

The Federal Regulation of Lobbying Act has been a useless tool in obtaining information about lobbying. Worse than useless, it gives the illusion that lobbying is under some form of public control or disclosure, while in fact there is none. It is poorly drawn, narrow in scope, full of loopholes, and easy to evade. The law is a sham, and secrecy continues to blur the massive lobbying efforts of organized groups. The recent documentation of ITT's extensive lobbying of the Executive branch makes the case for full disclosure of executive branch lobbying by those who lobby and by those who are lobbied. It's time to strip away this comfortable secrecy when the public business is so involved.

#### FREEDOM OF INFORMATION

We have also witnessed a new threat to freedom of information in the form of rules of evidence changes proposed by the Supreme Court last November. One of the new rules would grant government officials the privilege to refuse to give evidence and to prevent any person from giving evidence if the testimony is likely to reveal a "secret of state" or "official information". A secret of state is defined as a government secret relating to "the national defense or the international relations of the United States." Official information is any government information whose disclosure "is shown to be contrary to the public interest." These privileges could be seriously abused in freedom of information litigation to prevent citizens from obtaining access to government documents in which they have a legitimate interest.

The classification system is another example of unwarranted and damaging government secrecy. It was disclosed in hearings held in 1971 by the House Committee on Government Operations that 5,100 governmental officials had original Top Secret classification authority, 7,687 employees have original Secret classification authority, and 31,048 have original Confidential authority. Moreover, the practice of "derivative" classification has undermined any effort to limit the number of people in government who wield classification stamps. The consequence of this has been an outrageous abuse of the classification system. A Defense Department official estimated, for example, that Defense alone holds over twenty million classified documents. One expert asserted that probably 99.5% of these documents could be released without endangering national security. Because of this abuse, many Congressmen feel they cannot get the information they need to function effectively. The amount of information withheld from the public is even worse. Moreover, the dependence of the Congress and the public on the executive as their sole source of information on certain matters has a built-in danger. There is a strong tendency for the executive to supply only that information which puts its proposals and activities in a favorable light. By blocking the free flow of unbiased information, the present classification system has distorted the principles of public sovereignty and the separation of powers.

The abuse of the classification system is related to a larger problem involving the inability of the Freedom of Information Act to effectively combat secrecy in government. President Johnson stated in 1967 when he signed the Act: "a democracy works best when the people have all the information that the security of the Nation permits." In theory, the Act was supposed to guarantee that information. But right from the beginning it did not. The Act must be strengthened if we are to foster an open society.

One such development involves the right of the government to withhold certain information and the judicial review of the exercise of that right. The Act lists nine exemptions to the government's obligation to disclose information. But it also gives the district courts authority to review an agency's refusal to release requested documents on the basis of these exemptions. The test came in relation to two such exemptions: Exemption 1 which applies to documents which the President has determined must be kept secret in the interest of national defense or foreign policy; and Exemption 5 which applies to inter-agency or intra-agency memorandums. Several members of Congress brought suit under the Act to compel disclosure of nine documents concerning a nuclear underground test on Amchitka Island. The district court upheld the government's claim that the documents were exempt from compelled disclosure on the basis of Exemptions 1 and 5. The Court of Appeals, however, reversed this decision. It maintained that Exemption 1 only applied to the secret portions of classified documents. It also held that Exemption 5 only applied to "decisional processes" rather than factual information. It thus ordered the District Court to examine the documents *in camera* to separate the various aspects. The case was finally decided by the Supreme Court only last January (*Mink v. EPA*). A divided court held that Exemption 1 did exempt the documents from being disclosed and that judges were not allowed to examine them *in camera* to sift out "non-secret components." Second, it held that Exemption 5 did not require that otherwise confidential documents be made available for inspection by the courts regardless of how little, if any, purely factual information they contain. In short, the Court ruled that, if the Executive Branch says it's secret, it's secret. What about the power to review the government's claim to secrecy which the Act seemed to give the courts? It proved to be no power at all.

The weakness of the Act has also been demonstrated in a number of cases where important information has been withheld from the public and Congress. These result from the Act's stipulation that information must be requested; otherwise, no disclosure is required. If the existence of a document is unknown, disclosure of its contents will never be requested. If certain government activities are kept secret, questions about such activities will never be asked. For example, the Senate Foreign Relations Committee held hearings in 1969 to ascertain the extent of American military involvement in Laos. In describing this involvement, the Ambassador to Laos neglected to mention large-scale bombing missions being conducted by the U.S. Air Force. When he was asked about his omission later, he explained that he had not been asked any questions about such operations in northern Laos. To which Senator Fulbright replied: "We do not know enough to ask you these questions unless you are willing to volunteer the information." The committee eventually found it necessary to send its own staff of investigators to Laos to find out what was going on.

We have seen other instances where vital information was kept secret because it wasn't specifically requested. One involves the SST. A study headed by Richard L. Garwin had urged the government to withdraw its support of the SST for a number of reasons. It cited unpredictably excessive cost, the plane's dubious capabilities, questionable commercial viability of the European supersonics, and detrimental effects on the environment. The Administration kept the report secret, and went ahead with its support of the SST prototypes. One billion dollars of the taxpayers' money was used to help develop the prototype before Congress intervened. The Garwin Report was released belatedly by the Office of Science and Technology.

Another instance is seen in the so called "Russian wheat deal." The Department of Agriculture evidently suppressed a report which would have helped U.S. farmers get a higher price for their wheat. The report indicated that the Russian grain crop had worsened and that their demand for U.S. grain would far exceed previous estimates. Had the report been made public it would have driven wheat prices up, to the benefit of the American farmer. As it was, the farmers didn't know of the impending Russian demand, and sold their 1972 crop too soon. Too soon, that is, to benefit from the 30% jump in price which resulted when the full extent of Russian buying surfaced. The benefits were instead reaped by large grain exporters who had bought cheap wheat from the farmers. They were able to sell it to the Russians for as much as 70¢ more per bushel than they paid for it! The only defense given for not releasing the report was that it was "too controversial" and therefore classified confidential. The point to be made from these examples is simply this: the public has a right to know these things. For such reports as those dealing with the SST and the Russian wheat situation are made



at the public's expense and are vital to the making and evaluation of public policy. The public thus has a right to see the results, and government the obligation to protect that right.

#### GENERAL RECOMMENDATIONS

Mr. Chairman, I have discussed all these areas of secrecy in government for two basic reasons. First, to indicate how pervasive the problem has become, degrading the political process at almost every level. And second, to thereby clarify how urgent the need is today for comprehensive reform of the way government conducts itself. What is needed is a basic change in orientation—an orientation in government in which openness is presupposed, in which disclosure of information is the general rule. Today the reverse is true: secrecy is presupposed, and unless officials see some special reason for openness and disclosure, secrecy is the rule. Representative John E. Moss put it right when he said over 15 years ago that the real problem “concerns the spirit with which the agencies read the statutes, and the attitude taken by administrators toward the public's right to supervise the Federal Government.”

Common Cause believes that specific legislation is needed in several areas in order to bring about this fundamental reorientation. For example:

We need legislation which defines and limits the scope of claims to executive privilege, and which gives Congress the power to review such claims. We commend the initiative taken by Senator Ervin in this regard.

We need comprehensive reform in the area of the Federal budget—reform which pertains to the process by which the budget is made and evaluated, the content of the document, and the administration of appropriated funds. Senator Humphrey's proposal to open agency hearings to state and local officials is a step in the right direction, as is Senator Mondale's proposal for a new committee on goals and priorities and other proposals for structures giving a comprehensive approach to Congressional budget decisions. The basic issues here are openness and oversight. Congress must take an overview of what the government does and should do, and it should do it openly. The entire system in which priorities and expenditures are established and administered must be opened to Congressional and public participation.

We need open-meetings legislation which would guarantee that the public business be conducted publicly. Common Cause commends the recent reforms adopted by the House in this regard, and we endorse the legislation introduced by Senator Chiles and Congressman Fascell on open meetings.

We need a strong lobby disclosure bill which would enable all public officials, and the public generally, to know who is lobbying whom for what, how much they are spending, and the full range of their activities. The disclosure bills introduced by Senator Stafford and Senator Kennedy make for a far better law than we have now. To be effective any legislation must not only apply to lobbying of Congress but to lobbying the Executive, and regulatory agencies as well.

We need to revamp the present classification system in such a way that the criteria for classifying documents is substantially tightened. The number of officials who have classification authority must also be strictly limited.

Finally (although this list is far from exhaustive), we need a stronger Freedom of Information Act. This brings me to the amendments to the Act which are presently being considered by the committees assembled here. I will limit my remarks to three such amendments.

#### SPECIFIC RECOMMENDATIONS FOR THE FREEDOM OF INFORMATION ACT

First, S. 1142 would require agencies to respond within ten days to requests for documents or information. These responses must state whether the agency will comply with the request, and give reasons for any refusals or delays. Our own experience in recent days has borne out the necessity of this amendment and the feasibility of complying with it. Common Cause recently requested, by means of hand-delivered letters, to study the budget justifications of 19 Federal agencies or offices. We noted in the letter that, by the terms of the Act, the public should be allowed to inspect and copy these documents. We asked that our letters be responded to within 10 business days. At the end of 10 days, only 11 agencies had responded. And of these, only 4 had complied with our request. Two other agencies explained that they were unable to comply. In one case because the documents had not as yet been prepared; in the other because their operations were being phased out. However, the 5 remaining agencies refused to comply because the Appropriations Committees instructed them not to, or be-

cause the documents were now the property of these committees. This is not how we read the law. The agency excuse is unsatisfactory. The power exercised by the Appropriations Committees in placing a lid on these documents is totally unwarranted. Eight agencies have not responded at all!

This much is clear: (1) Agencies can respond to such requests within 10 days. Some responded almost immediately after receiving the requests. (2) The large percentage which refused to respond substantiates the need for the amendment.

I request that the Common Cause letters and the agency replies be made part of the record.

Second, there is an amendment which would reverse the Supreme Court decision in *Mink v. EPA*—It would clearly place the burden of proof for withholding information on the government. Accordingly, it would require courts to examine agency records *in camera* to determine if such records were exempt. In cases where Exemption 1 is claimed, the courts must examine the classified records to determine if disclosure would be harmful to the national defense or foreign policy. We believe that this amendment is of utmost importance. It enables the courts to play a significant role in checking governmental tendencies to classify nonsensitive information, which the public has a right to know. Besides, the Supreme Court decision assumes that disclosure to a judge may somehow jeopardize national security. We see no reason why a federal judge cannot be trusted to keep the government's legitimate secrets.

A third amendment would require annual reports from each agency on their record of compliance with the Act. It would require an accounting of each and every refusal to disclose the information requested. It would institutionalize a watchdog function over agency performance. Agencies would be under constant pressure to comply with the Act responsibly and completely. Compliance would be the rule and not the exception. The requirement would also enable interested parties to review the overall effectiveness of the Act and recommend other changes. We believe this amendment is essential if the Act is to be effectively enforced and taken seriously by government agencies. We propose, however, that the amendment be changed to require quarterly instead of annual reporting. Such a change would serve to guarantee and strengthen the effectiveness of the reporting requirement.

Common Cause urges the adoption of these and the other amendments which have been proposed. We believe they are essential if the Freedom of Information Act is in fact to make information free and available. Adoption of these amendments would be an important and necessary step toward openness in government. The road to this end is long, and many other steps need to be taken. But what is at stake is the very integrity of our democratic process.

Mr. COHEN. On my right is Robert Gallamore, the director of Policy Development for Common Cause, and he serves as director of our issues-development, and on my left is Pat Keefer, who is a Common Cause lobbyist and whose principal responsibility is the whole area of antisecrecy and freedom of information.

I think the work of these subcommittees has been terribly important in setting an example of what an open hearing can be. We start with a recognition that the Congress is an unequal branch of Government. I think most of the Congress have come to recognize this. We know that the old situation of 10 years ago when the Congress appeared to be unresponsive to the executive branch and we all said the executive proposes and Congress should dispose, is really misleading. It is an inadequate method of dealing with our problems.

I think we are dealing here with several areas. One is the relationship of information between the executive and the Congress, and another is the Congress and the public, and finally, between the executive and the public. And what we have to look at is how to develop an affirmative antisecrecy policy in which the whole burden has shifted in the direction of the free flow of information not only between the executive and Congress, but between the executive and the public, and the Congress and the public as well.



And the key point that has come out over and over again in the testimony today and earlier is that there has to be a shared information base in each point, that critical decisions are made in the executive branch. And Congress has to start to set the example of opening itself up to the public. I think there are a lot of ways it can do that and I want to just briefly run through them.

It obviously goes without saying that if we ever needed legislation on executive privilege, all doubts were resolved yesterday with the reckless statement of the Attorney General, with the dangerous doctrine that he developed of no accountability between elections. That statement is really incomprehensible to me for a legal officer to make in a political democracy. But the point is that there is a lot of attention on that now.

We can't limit ourselves just to executive privilege though. The time for Congress to act is right now and this problem not only goes to the question of executive privilege, but it goes to the whole question of open meetings and general antisecrecy.

Common Cause supports the bill that Senator Chiles and Congressman Fascell have authored on open meetings legislation. That comes before the Government Operations Committee. We want to see fast action because this is the time to strike.

There is more to secrecy than just a question of meetings. It is how the whole budget is considered and how the whole programing and re-programing that goes within the budget comes out and the way agencies shuffle funds around and we need legislation in that area. It has to be part of an affirmative antisecrecy policy to open up the budgetary process well in advance of the time the executive branch comes down and starts discussing it with members of the Appropriations Committee.

That is the second point, and the third thing is that secrecy goes on all of the time in Government between the private world and the executive branch and nothing was more dramatically shown than the congressional hearings on ITT. We need lobby control legislation that not only puts the finger on Congress as to your relationship between lobbyists and Senators and Congressmen, but really begins to put the finger on the executive branch and the independent agencies. That is a vital aspect of this.

Finally, before I get to the Freedom of Information Act, I think we have to own up to the fact that Congress has to do better than it has done on secrecy. It was disappointing here in the Senate to see that the whole direction of open meetings, of open markups, was defeated on the floor of the Senate when the House of Representatives has now adopted a rule that shifts the burden and presumes openness and that rule is working right now. And I hope that the Senate catches up to the House.

The only exception that we have had so far has been the House Appropriations Committee. That is the only committee that has closed its meetings. Every other committee that has had markups, whether it is in the Foreign Affairs Committee or the Public Works Committee, which is the most secrecy prone committees, have met in open hearings and here in the Senate, also, the Senate Banking Committee is meeting in the open and the Senate Interior Committee is meeting in the open and it is working. So please hurry up and change the process.

Senator CHILES. The Committee on Government Operations is holding public meetings——

Mr. COHEN. I am glad that is happening, too. I hope it works.

Senator MUSKIE. May I say the committee will be meeting tomorrow to consider S. 1214, legislation that I introduced with Senator Ervin to require agencies to send to the Congress and to make available to the public their budget requests at the same time those requests are submitted to OMB. That bill is consistent with the suggestion you have just made.

As a matter of fact, today there are 16 hearings being conducted by the Senate and House Appropriations Subcommittees on various aspects of the budget and 5 of those are in the Senate, 11 in the House, and all are open to the public. Today there are 19 committee meetings in the Senate, only one of which, the Armed Services Committee, is closed. There are 35 in the House of which 5 are closed. Now that is progress. It isn't perfect, but it is progress.

Mr. COHEN. It is a lot of progress, and I think we have to get to the markup question though. It is the markups that are the critical tests, and the progress we made here in the Government Operations Committee is welcome.

On the Freedom of Information Act, Common Cause from our own judgments and efforts in trying to document priorities and waste in Government wrote to 19 Federal agencies and wrote them a letter asking for their budget justifications, which we thought we were entitled to under the Freedom of Information Act. In part these were representative agencies. None dealt with the question of national security. Only two dealt with the foreign-policy-related items. This in part was a test and in part it was to provide information for us. And in the statement I submitted to the Committee the letter and the response are part of the record. I think what is revealing about that is, one, agencies can respond promptly, not all have; six haven't even supplied yet any information in violation of the law, but agencies can reply promptly, therefore, Senator Muskie, your own proposal in S. 1142 I think is necessary and workable and that would require agencies to respond within 10 days on requests for documents or information. So it can be done and it is being done. The amendment would be most useful.

I think the other thing is the Supreme Court decision *Mink v. the Environmental Protection Agency* should be reversed by the Congress. The fact is that that decision really negates the Freedom of Information Act. I think that is fairly clear. I think if Congress would reverse the holding of the Court, which was a divided Court, that would be important progress in the Freedom of Information Act.

The proposal to require annual reports from each agency on the record of compliance with the act, is also useful. We support it, we think it ought to be done on a quarterly basis. We think that is workable because the agencies should constantly be keeping a record. I think the more discussion that exists between the Executive and the legislative branch, the better, that would be useful.

Now this goes to the whole question of your own ability to provide oversight, to monitor programs that you enact. And I think it would be useful to do this on a quarterly basis.

Finally, the one thing that disturbs me, and again this is a congressional problem, and that thing is that most of the agencies that



replied to us said we have submitted our requests to the Appropriations Committees and these requests, these budget justification requests, are the property of the Appropriations Committees. Now we disagree with that. The problem lies with the agency itself, but the greater problem lies with the Appropriations Committees. I think it is important that as Congress moves towards being an equal branch of Government, that we don't consciously or unconsciously set up the Appropriations Committee as a third House of Congress, which would be analogous to John Dean being a witness and when Senator Ervin refused John Dean's testimony—which actually wasn't testimony, but it was in fact not showing up—and so we shouldn't have a second class, a different class of committees in Congress as well. I think it is important to recognize that information that is presented to the Appropriations Committee belongs to the public and to the Congress when it is presented and I think that would go a long way toward providing for a free flow of information.

We look for action and we are ready to work on the legislation this committee is going to produce, and I hope you produce quickly so you can begin putting the pressure on the House of Representatives and so that laws are passed.

And one final word, I know that the President has successfully vetoed two pieces of legislation. I hope we don't have a vetoproof concept here in the Congress. This is not legislation around old social programs or new social programs. This is legislation around the building of Congress as an institution, the making it an equal branch of Government. I would hope this committee in the Senate and the House go ahead and produce the best possible legislation and we will work our best with you to make Congress an equal branch.

Senator MUSKIE. Thank you.

On the question you raised about the Appropriations Committees, now as I understand it you received five refusals, all of them based on the claim that the information is now the privileged property of the congressional Appropriations Committees. Would you give us the names and identities of the agencies which made that assertion?

Mr. COHEN. Yes, the Department of Agriculture, Mr. Kenneth Grant; Arthur Hess, who is the Deputy Commissioner of Social Security; Mr. Gene Morrell who directs the Office of Oil and Gas of the United States Department of the Interior; and most significant of all, the Justice Department, which in fact used the word property, that is where I got that word. It stuck in my mind as I read their answer. They have this property concept of it going from the executive branch to some subcommittee of the House Appropriations Committee or the Senate Appropriations Committee, and also the Manpower Administration, Mr. Merwin Hauns, and the Undersecretary of Transportation as it relates to the Federal Highway Administration Program.

Senator MUSKIE. Now you checked that assertion by the agencies with the appropriate Appropriations Committee?

Mr. COHEN. We plan to.

Senator MUSKIE. You haven't done that?

Mr. COHEN. Not yet. We will convey our response, our information, to you.

Senator MUSKIE. Fine.

[The material referred to above follows:]

COMMON CAUSE,  
Washington, D.C., June 5, 1973.

HON. EDMUND S. MUSKIE,  
*Chairman, Intergovernmental Relations Subcommittee,  
Old Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: In the course of my testimony before your subcommittee on April 11, 1973, you requested that I inform you of the response of the Senate and House Appropriations Committees to our request to examine various agency budget justifications. This letter is a reply to your request. It also summarizes and updates our efforts to examine these documents and the various obstacles we have encountered.

As noted in my testimony, Common Cause has long advocated an end to the secrecy that shrouds so much of the governmental process. The public's business is often not conducted publicly, and information about official activities, decisions, and plans is often withheld. The effect is to undermine the public's ability to hold government officials accountable for what they do and to prevent meaningful and informed public participation in government affairs. In short, secrecy locks the American people out of government affairs and so tends to corrupt those affairs. A basic change in orientation is needed—an orientation in government in which openness is presupposed. We believe that a stronger Freedom of Information Act is an important step in achieving this goal, and we commend you and your subcommittee for your fine and thoughtful work in this area.

The lack of citizen access to government information is something that Common Cause knows only too well. Our most recent experience of it involves our efforts to examine the budget justifications of certain Federal agencies which are submitted to the Appropriations Committees. I would like to review the facts of the case and our dismay concerning it.

Last March Common Cause requested to examine the budget justifications of nineteen Federal agencies and offices (see Enclosure 1). We chose agencies which deal with matters in which Common Cause has an active interest. In making our requests, we noted that the budget justifications should be available for public inspection under the provisions of the Freedom of Information Act. Section 552a (2)(B) of the Act requires that "statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register" be available for public inspection. We also asked that the agencies respond to our request within ten business days. Enclosed is a copy of the letter we sent to the nineteen agencies (Enclosure 2).

The response of most of the agencies was a startling illustration of secrecy in government. Only seven agencies complied with our request: the other twelve refused on grounds that the documents were prepared for and belong to the Appropriations Committees. This is not a valid reason for withholding the information from the public. It is the agencies' responsibility, under the Freedom of Information Act, to make their budget justifications available. If for some reason the law does not cover this situation, it should be tightened so that it does. Nor did most of the agencies respond within 10 business days. Nine did; but the other ten took from eleven to twenty-five business days to answer our letters. Enclosed is a copy of all the letters we received from the agencies in response to our requests (Enclosure 3). Most of our requests were hand delivered on March 26. The date on the upper right-hand corner of the replies indicates when we received them.

We then wrote to the Chairman of both the House and Senate Appropriations Committees requesting the documents which had been refused by the agencies (see Enclosure 4). A full month passed before we heard from Senator McClellan. The chief clerk of his committee finally called and said that we could come and inspect the documents. Representative Mahon replied more promptly, although much to our dismay (see Enclosure 5).

His reply strikes us as a blatant affront to freedom of information and the public's right to know. The Committee is in effect saying that while it is deliberating over agency budget requests—requests which involve public funds and public programs—there shall be no public knowledge or scrutiny of what's happening. The Committee knows that information gives power, and it wants to keep that power for itself and out of the hands of the people and other members of Congress. Some agencies noted that while they had no objection to releasing the documents, the Appropriations Committees has specifically prohibited them from doing so.



Common Cause believes that secrecy in government is sometimes, although not often, justified. But there is clearly no justification in this case. Mr. Mahon's Committee acts as though appropriating public funds for public purposes is their *private* business and not the public's. This sort of secrecy in government is outrageous and contemptible. It is a misuse of power and a distortion of the public process.

We urge your subcommittee to strengthen the Freedom of Information Act in ways that will correct this scandalous situation.

I would appreciate your making this letter and the enclosures a part of the hearing record. Thank you for your attention to this matter.

Sincerely,

DAVID COHEN,

*Vice President and Director of Operations.*

[Enclosure 1]

1. Council on Environmental Quality, Mr. Russel E. Train, Chairman.
2. Office of Consumer Affairs, Ms. Virginia H. Knauer, Director.
3. Soil Conservation Service, Department of Agriculture, Mr. Kenneth E. Grant, Administrator.
4. U.S. Forest Service,<sup>1</sup> Department of Agriculture, Mr. John R. McGuire, Chief Forester.
5. Office of Minority Business Enterprise,<sup>1</sup> Department of Commerce, Mr. John L. Jenkins.
6. Economic Development Administration, Department of Commerce, Mr. Robert A. Podesta, Assistant Secretary.
7. Maritime Administration,<sup>1</sup> Department of Commerce, Mr. Robert J. Blackwell, Assistant Secretary.
8. Social Security Administration,<sup>1</sup> Department of Health, Education, and Welfare, Mr. Arthur E. Hess, Deputy Commissioner.
9. Community Development,<sup>1</sup> Department of Housing and Urban Development, Mr. Floyd H. Hyde, Assistant Secretary.
10. Office of Oil and Gas,<sup>1</sup> Department of Interior, Mr. Gene P. Morrell.
11. Bureau of Land Management, Department of Interior, Mr. Burton W. Silcock, Director.
12. Antitrust Division,<sup>1</sup> Department of Justice, Mr. Thomas G. Karpen, Assistant Attorney General.
13. Tax Division,<sup>1</sup> Department of Justice, Mr. Scott P. Crampton, Assistant Attorney General.
14. Law Enforcement Assistance Administration,<sup>1</sup> Department of Justice, Mr. Jerris Leonard, Administrator.
15. Women's Bureau,<sup>1</sup> Department of Labor, Ms. Mary N. Hilton, Deputy Director.
16. Office of Employment Development Programs,<sup>1</sup> Department of Labor, Mr. Merwin Hans, Acting Deputy Associate.
17. Agency for International Development, Department of State, Mr. John A. Hannah, Administrator.
18. Federal Highway Administration,<sup>1</sup> Department of Transportation, Mr. Ralph R. Bartelsmeyer, Acting Administrator.
19. Division of Reactor Development and Technology, Atomic Energy Commission, Mr. Milton Shaw, Director.

[Enclosure 2]

COMMON CAUSE,

*Washington, D.C., March 26, 1973.*

DEAR \_\_\_\_\_: As President of Common Cause, a national citizen's lobby with over 200,000 members, I am anxious to participate intelligently in the discussions in Congress on budget appropriations of Fiscal 1974. I am particularly interested in the operations of \_\_\_\_\_ as they touch on concerns in which Common Cause has an active interest.

I therefore request that I be allowed to inspect and copy portions of the budget justifications submitted by your agency to the Congress for consideration by its appropriations committees. Under the provisions of the Freedom of Information

<sup>1</sup> Refused to release their budget justifications on grounds that the Appropriations Committees had jurisdiction over the documents.

Act (Section 552, a(2)(B) of Title 5, U.S.C.), the public is entitled to inspect and copy these itemized budget requests and explanatory notes, and I would find them extremely valuable both for informing the members of Common Cause about planned government operations in the next fiscal year and in preparing statements and analyses of those plans for presentation to the appropriate Congressional Committees.

I feel certain these documents are readily available, and I would appreciate your acknowledgement of this request and of your intention to comply with its being sent to me within ten business days.

I appreciate your cooperation.

Sincerely,

JACK CONWAY, *President.*

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[Enclosure 3]

U.S. DEPARTMENT OF LABOR,  
EMPLOYMENT STANDARDS ADMINISTRATION,  
WOMEN'S BUREAU,  
*Washington, D.C., April 10, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: This is in reply to your request of March 26 for a copy of the budget justifications submitted to Congress for the fiscal year 1974 Women's Bureau program.

The detailed justifications were submitted last week to the House Subcommittee on Appropriations for the Departments of Labor, and Health, Education, and Welfare and Related Agencies. The Subcommittee has a policy which prohibits us from furnishing copies of the justifications prior to the time hearings are held. Hearings are tentatively scheduled for late April.

Once the hearings have been held, we will send you a copy of the justifications.

Sincerely,

MARY N. HILTON, *Deputy Director.*

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,  
OFFICE OF THE ASSISTANT SECRETARY FOR COMMUNITY DEVELOPMENT,  
*Washington, D.C., April 23, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: Under Secretary Hyde has asked me to respond to your letter of March 26 requesting permission to inspect and copy portions of the budget justifications for Community Development (CD) programs as submitted to the Committee on Appropriations of the House of Representatives.

I regret that I am unable to respond favorably to your request. The justification materials to which you refer are the exclusive property of the House Committee on Appropriations and, in the past, have not been made freely available by the Committee until it has released the hearing transcripts and reported an appropriation bill.

However, this Department is quite willing to provide information and to answer questions about past or projected program budget levels for the various CD programs. This would include information as to FY '73 and '74 grant reservations, authorizations, appropriations, outlays, explanation of increases and decreases, and the like.

Should you be interested in receiving information of the type specified in the preceding paragraph, please submit specific questions to which this office may respond. However, if you would prefer to attempt to obtain a copy of the budget justification document you requested, you should contact the Committee on Appropriations of the House of Representatives.

Sincerely,

WARREN H. BUTLER, *Deputy Assistant Secretary.*



U.S. DEPARTMENT OF LABOR,  
OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION,  
*Washington, D.C., March 29, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: I am writing this letter in response to your letter of March 26, 1973, to Mr. Merwin Hans, Acting Deputy Associate Manpower Administrator.

I regret that we are unable to comply with your request. The staff of the Appropriations Committees has instructed us to treat budget justifications as material prepared for the use of the committee—material that must be held until the hearings are released by the Congress.

I would suggest that you contact the Chairman of the Appropriations Committee, Mr. Mahon, to acquire the material you desire.

Once again, I am sorry that we are unable to comply with your request.

Sincerely,

RICHARD E. MILLER,  
*Associate Assistant Secretary for Financial Management.*

U.S. DEPARTMENT OF JUSTICE,  
*Washington, D.C., April 2, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: Your requests to inspect and copy portions of the Fiscal Year 1974 budget have been referred to this Division. Attached are those sections of the President's budget reflecting the Department's requests.

Your letters also included a request for the notes prepared for the Congress at its direction. These materials are prepared in the format and form required by the Congress and are its property. Accordingly, these notes are controlled and released only by the appropriate Congressional Committees. Requests for copies of these materials should be directed to the pertinent Congressional Subcommittees.

Sincerely,

GLEN E. POMMERENING,  
*Acting Assistant Attorney General for Administration.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,  
OFFICE OF THE SECRETARY,  
*Washington, D.C., April 9, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: I am writing in response to your letter of March 26, 1973 to Mr. Arthur Hess, Acting Commissioner of the Social Security Administration. In this letter you requested that Common Cause be allowed to inspect and copy portions of the budget justifications submitted by SSA to the Congress for consideration by the appropriations committees.

Although neither the Department of Health, Education, and Welfare nor the Social Security Administration have any objection to complying with your request, budget justifications for the Department's programs are prepared according to the specifications of the Congressional committees on appropriations and are for their use. Therefore, since both we and the Congress regard them as Congressional documents, we have always asked inquirers such as yourself to request them from the appropriations committees. The principal staff members of the appropriations subcommittees which deal with SSA and most other HEW appropriation requests are:

Mr. Henry Neil, Staff Assistant, Labor-HEW Subcommittee, House Appropriations Committee, Room H-164, United States Capitol, Washington, D.C. 20515.

Mr. Harley Dirks, Professional Staff Member, Senate Committee on Appropriations, 1108 Dirksen Senate Office Bldg., Washington, D.C. 20510.

I trust this is responsive to your request.

Sincerely yours,

CHARLES MILLER,  
*Deputy Assistant Secretary, Budget.*

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THE UNDER SECRETARY OF TRANSPORTATION,  
*Washington, D.C., April 5, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: This is in reply to your letter of March 26, 1973, addressed to the Acting Administrator of the Federal Highway Administration (FHWA), Mr. Ralph Bartelsmeyer. You requested access to the budget justification material concerning FHWA submitted by this Department to the Appropriations Committees of the Congress.

The President's Budget, as submitted to the Congress, is accompanied by an Appendix in which all agencies supply detail conforming to a standard Executive Branch format described on pages 6 and 7 of that public document. Additional materials submitted later to the various Appropriations Subcommittees are prepared pursuant to instructions and requests from the subcommittees involved. The materials are organized in formats and detail specified by those subcommittees and, in our case, represent segments of data accumulated over the years by the subcommittees which review our requests annually.

Based on our understanding of the Committee's intentions, we have always treated the materials submitted to the Transportation Subcommittees of the Appropriations Committees in both Houses of Congress as records of those Committees. Accordingly, we consider the release of the materials a matter to be decided by the Committees involved.

Therefore, in response to your request, we respectfully refer you to the FHWA budget detail which appears on page 705 of the Appendix to the President's FY 1974 Budget and which continues for some 14 pages thereafter. Copies of these pages are enclosed.

Sincerely,

EGIL KROGH, Jr.

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U.S. DEPARTMENT OF THE INTERIOR,  
OFFICE OF OIL AND GAS,  
*Washington, D.C., April 5, 1973.*

Mr. JACK T. CONWAY,  
*Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: Mr. Duke R. Ligon, the new Director of the Office of Oil and Gas, has requested me to reply to your letter of March 26, 1973 in which you requested permission to inspect and copy portions of the Office of Oil and Gas FY 1974 Budget Justification.

Customarily the budget justification materials are regarded as the property of the Congress, inasmuch as they are prepared for Congress along lines requested by Congress. We suggest, therefore, that you contact the staff director of the subcommittee on Interior Department appropriations of the Senate Appropriations Committee, with whom your request has been discussed. His name is Dwight Dyer.

The budget justifications were presented to that subcommittee and testimony given by Mr. Ligon and others last month. Enclosed are materials which were made available to the public and the media at that hearing:

- I. Opening statement of the Director, Office of Oil and Gas
- II. An additional summary statement by the Director



III. A special report entitled "Overview of the Domestic Petroleum Situation"

We wish further to call your attention to the fact that the Budget Justifications, and transcripts of entire hearing proceedings, are customarily published by the Senate and House committees after completion of all hearings.

Your interest in the proposed programs of the Office of Oil and Gas is appreciated.

Sincerely yours,

JAMES R. GOODEARLE, *Associate Director.*

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,

*Washington, D.C., April 20, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: This is in reply to your letters of March 26, 1973, requesting that you be allowed to inspect and copy portions of the budget justifications for fiscal year 1974 relating to the Maritime Administration and the Office of Minority Business Enterprise which the Department of Commerce submitted to the Congress.

You indicated that your request was made pursuant to section 552(a)(2)(B) of Title 5, U.S. Code, which applies to "those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register."

However, the itemized budget requests and explanatory notes to which you refer are not in fact such statements of policy and interpretation. They are rather materials which were prepared for the Congress at its direction, and in a manner and form which it has required, as part of the appropriation process. The materials have been submitted to the respective Appropriation Committee of the House and Senate, each of which Committees considers the information contained therein to be controlled and released only by it in its discretion.

The Department does not, therefore, have the authority at this time to permit public access to these materials, and any request to release them should be made directly to the chairman of the appropriations subcommittee which now has these budgetary matters under consideration.

Sincerely,

ALFRED MEISNER, *Assistant General Counsel.*

U.S. DEPARTMENT OF AGRICULTURE,

FOREST SERVICE,

*Washington, D.C.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: The 1974 Forest Service budget justifications are prepared at the request of, and furnished to, the Congressional Appropriations Committees. We are sorry but we are unable to comply with your request of March 26 that we furnish you with a copy of the 1974 justifications. We do not have their approval to do so.

However, the Forest Service submission to the Congress will be reprinted in the House Hearings record for the Department of the Interior and Related Agencies Appropriations for 1974. These hearings were held before the Subcommittee of the Committee on Appropriations, House of Representatives, on February 27 and 28, 1973, and the "page proof" of these hearings has now been printed. Mr. J. David Willson, the Clerk of this Subcommittee, has advised that you could look at this "page proof" if you desire. Mr. Willson's telephone number is 225-3081. We will also be glad to send you a copy of the printed hearings when our supply is received.

Sincerely,

JOHN R. MCGUIRE, *Chief.*

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF CONSUMER AFFAIRS,  
Washington, D.C., April 18, 1973.

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
Washington, D.C.

DEAR MR. CONWAY: This is in response to your recent letter to Mrs. Knauer, in which you requested access to the proposed fiscal 1974 budget prepared by the Office of Consumer Affairs in connection with its appropriation for that year. You assert that, under 5 U.S.C. 552a(2)(B), "the public is entitled to inspect and copy" such material.

Chairman Whitten of the Subcommittee on Agriculture, Environmental and Consumer Protection, House Committee on Appropriations, and Chairman McGee of the Subcommittee on Agriculture, Environmental and Consumer Protection, Senate Committee on Appropriations, have advised us that they have no objection to providing you a copy of this Office's proposed fiscal 1974 budget. As you are probably aware, such documents are prepared at the request of and for use by Congress and accordingly requests for these materials ordinarily should be directed to the appropriate Congressional Committee.

Chairmen Whitten and McGee have advised us that their disposition of this request is not intended to establish a precedent concerning the question of public access to budget documents as a matter of right.

I hope this information will be helpful to you.

Sincerely,

ERIC J. FYGI, *Acting General Counsel.*

DEPARTMENT OF STATE,  
AGENCY FOR INTERNATIONAL DEVELOPMENT,  
Washington, D.C., March 28, 1973.

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
Washington, D.C.

DEAR MR. CONWAY: Dr. Hannah has requested that I reply to your letter of March 26, 1973, concerning the budget justifications submitted by A.I.D. to the Congress for consideration by its appropriations committees.

A.I.D. is now in the process of preparing its "FY 1974 Program Presentation to the Congress," which is expected to be available during the first or second week in April. In addition, separate FY 1974 "Program and Project Data" books for A.I.D. activities in Africa, Asia, and Latin America are also being prepared and are expected to be available by mid-April.

I will be happy to forward a copy of these documents to you as soon as possible. If you should need additional information or assistance regarding the budget justifications, please do not hesitate to contact this office.

Sincerely yours,

MATTHEW J. HARVEY,  
*Director, Office of Legislative Affairs.*

U.S. DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT,  
Washington, D.C., March 30, 1973.

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
Washington, D.C.

DEAR MR. CONWAY: As requested in your letter of March 26, 1973, I am forwarding a copy of our Fiscal Year 1974 Budget Justification which was submitted to Congress in January 1973 as part of the President's Budget. You may also find useful the enclosed brochures which summarize the same budget submission.

If you have any questions on the enclosed material, please feel free to call our Budget Officer, Mr. Paul Vetterick, at 343-8571.

Sincerely yours,

BURT SILCOCK,  
*Director.*



U. S. DEPARTMENT OF AGRICULTURE,  
SOIL CONSERVATION SERVICE,  
Washington, D.C., March 29, 1973.

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: We are responding to your March 26, 1973 correspondence requesting copies of the Soil Conservation Service explanatory notes for Fiscal Year 1974.

These explanatory notes are prepared for congressional committees to use in their consideration of the budget. We have asked them for their permission and they have agreed to release the explanatory notes. A copy is attached.

KENNETH F. GRANT,  
*Administrator.*

U.S. DEPARTMENT OF COMMERCE,  
ECONOMIC DEVELOPMENT ADMINISTRATION,  
*April 2, 1973.*

Mr. JACK T. CONWAY,  
*Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: This is in response to your letter of March 26, 1973, requesting information on the Economic Development Administration's budget for Fiscal 1974.

The 1974 budget does not include requests for the Economic Development Administration; however, the budget for the Department of Commerce includes a request for \$19 million to phase out the agency's programs.

Sincerely,

BARBARA A. ESTABROOK,  
*Director, Office of Public Affairs.*

U.S. ATOMIC ENERGY COMMISSION,  
*Washington, D.C., April 4, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: Attached is a copy of our FY 1974 Budget presented to the Congress for Reactor Development programs. Also attached is a copy of the prepared statement before the Joint Committee on Atomic Energy Authorization Hearings which were held on March 14, 1973. This statement, along with the budget justification, should provide explanatory data regarding our planned programs.

You may also find the printed transcript of the hearings before the JCAE very helpful. Since these are not yet completed, you may wish, at some time in the future, to request a copy from the U.S. Government Printing Office.

If we can be of further assistance to you, please let us know.

Sincerely,

MILTON SHAW,  
*Director, Division of Reactor Development and Technology.*

EXECUTIVE OFFICE OF THE PRESIDENT,  
COUNCIL ON ENVIRONMENTAL QUALITY,  
*Washington, D.C., March 27, 1973.*

Mr. JACK T. CONWAY,  
*President, Common Cause,*  
*Washington, D.C.*

DEAR MR. CONWAY: Receipt is acknowledged of your letter of March 26 requesting that you be "allowed to inspect and copy portions of the budget justifications submitted by the CEQ to the Congress for consideration by its appropriations committees." The full text of the budget justification as well as the Chairman's prepared remarks are transmitted herewith.

Sincerely yours,

W. G. SAVAGE, *Administrative Officer.*

[Enclosure 4]

APRIL 25, 1973.

HON. GEORGE H. MAHON,  
*Chairman, House Appropriations Committee,*  
*U.S. House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Last month Common Cause requested to examine the budget justifications of several Federal agencies and offices. We are anxious to participate responsibly in the public debate on planned government operations in the next fiscal year, particularly in those areas in which Common Cause has an active interest. The itemized budget requests and explanatory notes of certain Federal agencies would be of considerable assistance in this regard. We feel that public access to these documents is guaranteed under the provisions of the Freedom of Information Act (Section 552a (2) (B)).

Although some agencies have complied with our request, many have not. Eleven refused on grounds that the Appropriations Committees had jurisdiction over the release of these documents. A list of these eleven agencies is attached.

We therefore make our request to you, and hope that you will cooperate by sending us a copy of the budget justifications of these agencies.

Thank you for your cooperation.

Sincerely,

DAVID COHEN,

*Vice President and Director of Field Operations.*

The following is a list of agencies which refused to release their budget justifications on grounds that the Appropriations Committees have jurisdiction over the documents.

1. United States Forest Service, Department of Agriculture.
2. Office of Minority Business Enterprise, Department of Commerce.
3. Maritime Administration, Department of Commerce.
4. Social Security Administration, Department of Health, Education, and Welfare.
5. Office of Oil and Gas, Department of Interior.
6. Antitrust Division, Department of Justice.
7. Tax Division, Department of Justice.
8. Law Enforcement Assistance Administration, Department of Justice.
9. Women's Bureau, Department of Labor.
10. Office of Employment Development Programs, Department of Labor.
11. Federal Highway Administration, Department of Transportation.

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[Enclosure 5]

CONGRESS OF THE UNITED STATES,  
 HOUSE OF REPRESENTATIVES,  
 COMMITTEE ON APPROPRIATIONS,  
*Washington, D.C., May 7, 1973.*

MR. DAVID COHEN,  
*Vice President and Director of Field Operations,*  
*Common Cause, Washington, D.C.*

DEAR MR. COHEN: This is in response to your letter of April 25 expressing an interest in obtaining certain material associated with the budget estimates of several federal government departments and agencies.

The Committee takes the position that these so-called justification notes are prepared at the Committee's direction in accordance with the Committee's specific wishes and requirements formulated over a period of years. The requested notes constitute an explanatory memorandum for use by the Committee in connection with its responsibilities to conduct examinations of budget estimates.

As you know, much of this justification material is repeated verbatim in the Committee's published hearings. A schedule is attached which reflects the status of the various hearing volumes containing the testimony and other material for the organizations in which you have expressed an interest.

In the event that such justification information is not contained in the Committee's hearings, the Committee will be pleased to make the material available at the time the hearings are released.

Sincerely,

GEORGE MAHON, *Chairman.*



## COMMITTEE ON APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES

MAY 7, 1973.

1. Forest Service—All justifications in hearing. Hearing is available now.
2. Office of Minority Business Enterprise, Department of Commerce—All justifications will be in hearing. Estimated to be available about latter part of May.
3. Maritime Administration, Department of Commerce—All justifications will be in hearing. Estimated to be available about latter part of May.
4. Social Security Administration, Department of HEW—All justifications will be in hearing. Hearing estimated to be available about the third week of May.
5. Office of Oil and Gas, Department of Interior—All justifications will be in hearing. Hearing estimated to be released in about one week.
6. Antitrust Division, Department of Justice—All justifications will be in hearing. Hearing estimated to be available middle of May.
7. Tax Division, Department of Justice—All justification will be in hearing. Available middle of May.
8. Law Enforcement Assistance Administration, Department of Justice—All justifications will be in hearing. Hearing estimated to be available around middle of May.
9. Women's Bureau, Department of Labor—All justifications will be in hearing. Estimated to be available by first week in June.
10. Office of Employment Development Programs, Department of Labor—All justifications will be in hearing. Estimated to be available about the first week in June.
11. Federal Highway Administration, Department of Transportation—All justifications will be in record. Hearing not held yet (May 14 & 15). Should be available in early June.

Senator MUSKIE. Now did any of the four agencies which complied with your request refer to this doctrine?

Mr. COHEN. Not at all.

Senator MUSKIE. Not at all?

Mr. COHEN. No.

Senator MUSKIE. I would be interested to know to what extent they may feel restrained by any such policy, whether or not their compliance with your request represented a departure from that policy or failure to recognize its application?

Mr. COHEN. I don't know. And I am not sure I want to find out.

Senator MUSKIE. Well, you might as well turn over all of the rocks and find out what is under them.

Senator CHILES?

Senator CHILES. I'm delighted to hear your approval of the sunshine bill. We hope to have hearings on that early this year in the Government Operations Committee.

I noted in our hearing yesterday that even the small progress Congress has made to date is already causing us to have more enthusiasm as we approach cleaning up the house of the executive branch, because we have something about starting to clean up our own house. I am disappointed, as a Member of the Senate, that we didn't get as far as we should have gotten with the open meetings, proceedings, but we did take a step and now committee by committee we are working on this and from the results of the committees, I think we can go forward and I am delighted that the House went as far as they did in adopting the open meeting concept.

Senator MUSKIE. May I suggest that if those committees which opened up their markup sessions were to receive some exposure in the public media, it might put some pressure on the other committees who haven't.

Senator CHILES. I think that is a good idea. I think it is also interesting. Mr. Chairman, that all of the arguments that we heard about all of the evils that would befall us if we held those markup sessions in the open, I didn't see any of them materialize. It was said we wouldn't be able to speak with frankness and that every Senator would feel he had to make a speech on every point and that we couldn't have deliberations, we would never get a bill marked up, but we were able to mark up in our committee a bill as complicated as the impoundment bill with the debt ceiling amendment that I had offered attached to it and the committee was freely able I think to work its will in a very beneficial way because the meeting was open.

Senator MUSKIE. We got it done in 2 days, as I recall.

Senator CHILES. That is right. And I think that is the kind of progress that members that have voted perhaps another way are going to see and are going to realize that the evils that many people predicted will not come to pass. We will need your help when we come to the sessions of testimony on the sunshine bill because it does much more than apply to the Congress; it applies to the executive branch, it applies to a particular question you dealt with in regard to ex parte communications between an interested person and a member or employee of an agency. So a record would have to be kept of those proceedings so that at least the public would know after some momentous decision comes out of the Secretary of Agriculture or someplace else, some other executive agency, who visited him, who had a chance to talk with him, and so on.

That particular meeting would not necessarily be open because you can't open all of those up and make a meaningful decision, but a record would have to be kept of the fact there was a meeting and who was there and some light would come on that. So that certainly should govern some of the actions of the people in that light and——

Mr. COHEN. Senator, you will have our help on that. That is one of our priorities.

Senator CHILES. Your statement about the budget thing, I think, is also very important. The bill that Senator Muskie has introduced will be heard in our Government Operations Committee. When is that?

Senator MUSKIE. Tomorrow, in open session.

Senator CHILES. That will go forward a long ways in this. Most of us who have served in State legislatures are used to coming from the kind of proceedings in which public hearings are held before the Governor and/or the cabinet or the executive branch in which members of the legislature are invited to attend and members of the appropriate committees also do attend and their staff and each agency makes their presentation in a public meeting of what they think their needs. Then of course the executive has to present his budget in which he has to melt the requests and pare them down necessarily and then they come to the legislature, but in that instance the legislatures would be privy and have the opportunity to have all of the hearings and to know what the wish list is, if you want to call it that, of each agency, and then see what the executive branch had done to their request and determine whether we thought that the paring down was done properly because it is our constitutional role to determine what the spending is going to be and who is going to have what kind of money. So the public would be privy to that also if we could get some kind of open hearings. Then I think this argument that the legislative branch really just doesn't have the knowledge of what is going on and therefore just



doesn't know whether money should be spent for this program or that, or if a cutback has to take place, we have a better opportunity to know whether it should be cut back than the others. I think that that argument would go out the window and the public would have some better knowledge of what kind of programs we are appropriating for. I think those hearings can be awfully important.

Senator MUSKIE. Thank you very much, Senator Chiles, and thank you, Mr. Cohen, for contributing to this hearing which I hope is significant.

Our last witness today is Mr. Harding Bancroft, vice president of the New York Times.

Mr. Bancroft, I just got word I have another 15 minutes until my next appointment. I'm sorry I can't continue after that. It is a pleasure in any case to welcome you this morning and receive your testimony.

**STATEMENT OF HARDING F. BANCROFT, EXECUTIVE VICE PRESIDENT OF THE NEW YORK TIMES, ACCOMPANIED BY FELIX BELAIR, WASHINGTON BUREAU**

Mr. BANCROFT. Mr. Chairman, may I introduce Mr. Felix Belair, a seasoned reporter in our Washington bureau, who has had the responsibility himself in following up some of the efforts we have been making to get information under the Freedom of Information Act and if there are any questions as to the details of the efforts we have made, why Mr. Belair can answer them much more readily than I can.

Mr. Chairman, I am glad to appear today in response to your request for a report on the experience of the New York Times under the Freedom of Information Act, particularly our experience since the issuance in March 1972 of Executive Order 11652. In the light of that experience, I am delighted to give our comments on S. 1142, introduced by Senator Muskie, proposing amendments to the Freedom of Information Act.

When the Freedom of Information Act was signed on July 4, 1966, President Johnson stated that it sprang "from one of our most essential principles: A Democracy works best when the people have all the information that the security of the Nation permits." "No one," he said, "should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."

And the Attorney General, Mr. Ramsey Clark, in a memorandum to assist Government agencies in developing a uniform and constructive implementation of the law said that it "imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information." "It leaves no doubt," he said, "that disclosure is a transcendent goal."

In the years since the act became effective on July 4, 1967, that transcendent goal has not been realized.

New York Times reporters have had great difficulty in securing nonsensitive information to which the public is clearly entitled. We have met official resistance in respect to such matters as the number of medals awarded to generals in the Vietnam war, the identity of contractors found to have made excessive profits by the Renegotiation Board, reports of Government tests on consumer products, and so on.

When, however, Executive Order 11652 was issued by President Nixon, it created new hopes. As the President noted in his accompany-

ing statement, it was "designed to lift the veil of secrecy which now enshrouds altogether too many papers written by employees of the Federal Establishment." In what he called a critically important shift, the order put the burden on those who wish to preserve secrecy rather than those seeking declassification. And the President appeared emphatic in his intention to make the new procedures work. "The full force of my Office," he said, "has been committed to this endeavor."

But now, on the basis of the New York Times experience over the 13 months since the Executive order was issued, I must give you a weary and negative report. If the veil of secrecy has been lifted at all, only a thin sliver of light now shows through. If the "critically important shift" in the burden for preserving secrecy has taken place, that is barely evident. There is no outward or visible sign that the President has, in fact, committed the full force of his Office to this task. If he has, it has fallen on a disingenuous bureaucracy and the intolerable abuses of the security system that the President spoke of have not been eliminated.

In quick summary, since June 1972, we have formally requested declassification of 51 sets of documents, all at least 10 years old, and many going back 25 or more years. In four cases, we succeeded without appeal, one declassification coming just a week ago after almost 10 months of effort on our part. In another case, we succeeded only after an appeal and then a reappeal. Another request remains on appeal, still another is pending original decision.

That gives us a batting average so far of 5 for 49, or 0.102—not good enough even for the minor leagues. And, this meager 10 percent success record has come only after persistent efforts by The Times, efforts which are beyond the means of many smaller news organizations, let alone individual scholars and members of the public. We have come to conclude, as a result, that the President's emphatic order is not enough, and that in declassification as in the American League, what is now necessary is a designated pinch hitter, a compelling legislative response.

Executive Order 11652 called for the automatic declassification of most documents within no more than 10 years. Some materials could be specifically exempted, but even these were subjected to mandatory review if requested by a member of the public.

The Times sought to respond to this opportunity in a serious fashion. On Monday, June 5, 4 days after the executive order took effect, we initiated our first of a series of declassification requests which amounted in all to 51. These were directed to five agencies, on topics ranging from U.S. relations with the French Resistance in World War II, to the Bay of Pigs.

It is necessary to recount only a few of the responses to indicate why we have come to feel almost total frustration now that we have gone from the President's commendable language to the bureaucracy's dissembling or dilatory actions.

The precise nature of our experience has varied from agency to agency, but with the same general result. After numerous exchanges of calls and letters, usually over months, the buck is passed to another agency; or reasonable conditions in the executive order are used to block declassification without explanation; or expensive charges are proposed; or requests are denied, with an appeal suggested, though the reasons for denial—and hence for the appeal—are refused.

One notable instance began on June 5 when we asked the Depart-



ment of Defense for the comments of the Joint Chiefs of Staff on the Bay of Pigs operation. In a report dated July 24, the Department responded: "The JCS papers can be identified and placed under review." So far, so good. But then on August 8, we were told:

It turns out that the papers in question are in fact comments on documents prepared as a review separate from the basic collection of documents which, as you know, is under the control of the Central Intelligence Agency.

We responded to Defense—protesting "agile side-stepping and backpeddling"—and, on August 9, made a new formal request to CIA for the documents. Having received no response, we wrote again on September 6, specifying particular interest in the JCS comments. On September 25, CIA replied that it could not meet our request, the reasons given were a bureaucratic tour de force.

For one thing, CIA wrote, "We do not hold a specific group of documents formally identified as 'the basic collection.'" Second, while the Agency acknowledged having a large volume of documents relating to the Bay of Pigs, "Your request does not fulfill the requirement of sufficient particularity to fall within the executive order." We pointed out that:

Identification of specific documents could be made only by employees of CIA, the National Security Council, or the Departments of Defense and State. Merely to cite a lack of particularity . . . is to seize a technicality to frustrate the executive order and ignore the accompanying statement by the President.

Further, even if we had been able to divine the identity of specific, highly classified documents more than 12 years old as a precondition of their being declassified, CIA erected yet another obstacle. In the same September 25 letter, CIA wrote that intertwined among the documents, a large number of references to or reflections of intelligence sources and methods which could be jeopardized by release of these documents." Thus, CIA argued that the papers fell within an exemption in the executive order protecting intelligence sources and methods. To separate out still sensitive material, CIA wrote, "is simply not feasible."

In other words, Defense was prepared to review the material for declassification, but then backed off because it was in CIA's "basic collection." CIA said it had no "basic collection." Nor, could it identify, among the files it did have, documents that Defense could identify. And even if it could identify the documents, CIA said it was sure—even without any review—that they could not be declassified.

Finally, at the end of the letter, CIA wrote that it had consulted with Defense as to the JCS comments on the Bay of Pigs. In this specific instance, neither insufficient particularity nor jeopardizing intelligence sources could credibly be cited as reasons for refusing. But, in the absence of valid reason for refusal, we were simply refused without a reason. The CIA letter merely said, "We jointly agree that the JCS documents cannot be released." Only since we appealed this multilayered denial has CIA relented somewhat. In a letter received just last week, the Agency backed off its claim that our request lacked particularity. Now, on direction of the appeals committee, the Agency says it will, at least, conduct a complete review.

We had different frustrations with the Department of State, to which we sent requests for 31 documents. At length, under some prodding from the National Security Council staff, the Department attempted more seriously than others to be constructive and helpful. Three of our five successes involved the State Department.

But even before this meager achievement, we were subjected to a remarkable exercise. On June 27, we received a short, blanket denial of the 31 requests previously made on the grounds of insufficient particularity. Then, the NSC staff urged State to make at least a gesture of good faith compliance—if not with the Times requests, then at least with the President's order. State subsequently offered a new response. Yes, the Department wrote us, it could search for the information we requested, but the Times would have to foot the bill. Not the bill for the copying, which would make sense, but a bill estimated by the Department in the thousands of dollars—for searching out the documents themselves, which makes no sense. Aside from the amounts involved which could be prohibitive for the Times, and totally out of the question for smaller organizations, scholars, or private citizens, there are other practical considerations. Even if we agreed in advance to pay open-ended fees for searching out the relevant documents, the Department could not promise that any of them would, in fact, be declassified and made available to us.

And even after the payment of these fees, and even if the documents were declassified, there was no way in the world for us to know if they were worth reporting. I can readily understand the exasperation that last June prompted Max Frankel, then our Washington Bureau chief, in a letter to the head of declassification at the White House, to describe this all as “research roulette.”

Ultimately, we paid \$124 in research assessments and \$70 in copying charges for the three sets of documents finally declassified by the State Department. Among the copies charged for were European newspaper clippings that had been classified. None of the documents turned out to be newsworthy.

The single newsworthy success we have achieved so far concerned the Gaither report on the asserted missile gap of the late 1950's. Our original request to Defense was redirected to the National Security Council. At length, the NSC rejected the request without specifying a reason. We appealed to the Inter-Agency Review Committee on October 22. Three months later, the committee acted favorably on our request.

The fifth success should not, perhaps, be described as a success at all. It concerned a request to several agencies for documents relating to the exchange of Rudolph Abel for Francis Gary Powers. Last week, almost 7 months after our request, we received a set of relevant papers from the Department of Justice. None of these appear to be newsworthy.

Senator MUSKIE. I regret to say I must leave now. I do have some questions though I wanted to put to you and I will give those to Senator Chiles and he will ask them.

I would like, at this point to state I think your testimony is invaluable for the purposes of considering amendments to the Freedom of Information Act, and I gather from the remainder of your testimony that you comment upon the proposed changes. I hope that either you express approval of them or have constructive suggestions for altering them so that we can get at the task of eliminating some of the difficulties and frustrations we have had.

Senator CHILES. Proceed.

Mr. BANCROFT. The instances I have cited so far illustrate how agencies have used (1) delay; (2) “insufficient particularity;” (3) protecting intelligence sources; and (4) costs, as obstacles to declassification.



tion and disclosure. The Defense Department provided us with yet another. One of our original requests to that Department was for the answers to the "100 questions" that Secretary Robert McNamara issued at the start of his tenure. In response to our request, the Department said there was not, "to the best of our knowledge" any documentary assessment of the answers. "To prepare a summary at this time would involve an unreasonable amount of work," the Department wrote. Perhaps so, but it would have been more credible had the Department even tried to provide answers to some of the questions. As it stands, the Defense response invites the suspicion that the Department regards punctual declassification as too much trouble; that conforming to the strong views of the President is too much trouble; that informing the public is too much trouble.

It ought to be sufficient, in response to statements like "an unreasonable amount of work" or to the other bureaucratic evasions we have experienced, to cite the following words: "The many abuses of the security system can no longer be tolerated. Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies."

Those words come from President Nixon's statement accompanying the Executive order. They reflect an effort to strike a reasonable balance between the Government's need for confidentiality and the public's right to be informed. Yet if after the application of what the President called "the full force of my Office," the persistent efforts of a major newspaper can produce a production average of only 0.102, then we and the people of this country must look to Congress and the courts.

Given these problems and the sad and repeated history of unresponsiveness by the governmental functionaries from whom documents have been sought under the Freedom of Information Act, we are especially pleased at the introduction of S. 1142 by Senator Muskie and others. We believe that these amendments will have a salutary effect on the practical operation of the act and will increase, although not guarantee, the ability of the press to obtain governmental information which should properly be in the hands of the public.

Without specifically reviewing each of the changes which would be effected by the adoption of S. 1142, I think it may be useful to consider some of them that we think would be especially significant. One of these is the proposed amendment to section 552A(3) which would, in effect, substitute the words "records which are reasonably described" for "identifiable records." This would help to eliminate one of the excuses which unwilling officials have repeatedly used to prevent disclosure. One problem, obviously, that a journalist has in seeking official records from governmental agencies is knowing precisely what records the agency has. This was exemplified in the Bay of Pigs request. At least one of CIA's excuses in that case would be much less likely to be sustained under the new proposed language.

Second, the amendment expressly providing that, in a review by the Court, the Court has the power to examine the contents of any agency records in camera in order to determine if such records or any part thereof should be withheld under one of the statutory exemptions, is a particularly important one.

This amendment would meet and change the decision of the Supreme Court in the recent ruling in *Environmental Protection Agency v. Mink*, decided in January of this year. In that case, the Court in disallowing in camera judicial inspection of classified documents relating to possible environmental dangers of the Cannikin atomic tests in the Aleutians constructed most narrowly the exemptions contained in the Freedom of Information Act. Justice Stewart observed in his concurring opinion in that case that Congress: "has ordained unquestioning deference to the Executive's use of the 'secret' stamp."

Indeed, Justice Stewart observed that Congress had:

Built into the Freedom of Information Act an exemption that provides no means to question an executive's decision to stamp a document "secret," however cynical, myopic or even corrupt that decision might have been.

We think the Freedom of Information Act, if it is worthy of its name or declared purposes, should not be susceptible to such an interpretation. It is of fundamental importance that a court have the power to review the contents of records sought by newspaper reporters and that courts not be bound by a security classification placed upon documents up to 30 years ago by a cautious civil servant—let alone a "cynical, myopic or even corrupt" one. We urge the Congress to adopt legislation making clear that courts are free and even bound to examine the correctness of the classifications at the time the demand for the document is made. That is the important time. The judicial eye can see with clearer vision than a reluctant bureaucrat that the need for secrecy, even if real in one year may be nonexistent the next; and that the public is entitled to be aware of recent as well as ancient history.

This amendment, it seems to us, is also supported by Executive Order 11652, which calls for the separation of documents into classified and unclassified portions where that is practicable. It has been our experience that such a separation is practicable in the vast majority of cases, and that one of the dismaying features of the current classification system is that documents containing 95 percent of material which should never have been classified at all are classified "top secret" or "secret" because of a reference or a single sentence or paragraph contained in the document.

Similarly, the provisions of the proposed amendments establishing effective and binding time limits for agency determination and appeals will be most helpful in insuring that prolonged delays of the type that we have experienced will not frustrate the purposes of the act. In the journalistic field, stories that cannot be run when they are newsworthy often cannot be run at all. Reluctant officials are all too aware of this.

We also find most useful and needed the proposed revisions in S. 1142 to exemption 7 of the Freedom of Information Act so as to exclude from the exemption certain investigatory records such as scientific data, agency inspection reports relating to health, safety or environmental protection, and records serving as a basis for certain public policy statements of Government officials. There is simply no reason for such material to be kept secret.

That is the end of my prepared statement, Mr. Chairman. I have here a chart which gives in some detail the experiences we have had in trying to get these documents out.

Senator CHILES. If you have a copy of that, we would like to attach that as part of the record. That will be attached as part of the record.

[The material referred to above follows:]



## TABULATION OF THE NEW YORK TIMES' FREEDOM OF INFORMATION REQUESTS SINCE EXECUTIVE ORDER 11652

DEPARTMENT OF DEFENSE<sup>1</sup>

Type of information requested	Date of New York Times request	Date of agency response	Nature of response
9 requests:			
(1) Joint Chiefs of Staff studies, and record of national security discussion and administration debates on Bay of Pigs (1961).	June 5, 1972	June 8, 1972	Acknowledgment; please acknowledge if New York Times is willing to pay.
	July 21, 1972		New York Times will pay.
		July 24, 1972	Progress report on all 9 items; JCS can be reviewed; but try CIA for NSC discussions.
	Aug. 10, 1972	Aug. 8, 1972	NSC and JCS papers, now turns out, tied to CIA—ask them.
			New York Times says don't "pass buck" to CIA.
(2) Accounts of the negotiations for release of RB-47 fliers by the Soviet Union (shot down July 1, 1960; released Jan. 25, 1961).	June 5, 1972	July 24, 1972	Now on appeal, especially JCS comments.
(3) "White" contingency plans for World War II	June 5, 1972	July 24, 1972	Referred to State. (See State chart for final disposition.)
	June 5, 1972	July 24, 1972	Can probably be reviewed.
		Aug. 8, 1972	Still pending.
(4) McNamara's 100 questions, and any documentary assessment (Mar. 1, 1961)	June 5, 1972	Aug. 25, 1972	Released—see Archivist.
(5) Intelligence reports on Chinese troop movements prior to entry into Korean war (Nov. 1, 1950).	do	do	Denied; request too general; already published in military journal; any further summary would involve "unreasonable amount of work."
(6) Gaither report on so-called missile gap.	do	do	Denied; request too general; review 2 books where subject "extensively discussed"—then rephrase inquiry.
(7) Pentagon materials bearing on F-111 and contract awarded to General Dynamics.	do	do	White House control (see NSC chart for final disposition).
(8) Reports on U.S. involvement with Italian underground in Sicily and on the Italian mainland during World War II.	do	do	Denied; too vague—review McClellan hearings for "greater particularity."
(9) Reports on U.S. involvement with French underground during World War II	do	do	Refer to CIA.
	do	do	Do.

DEPARTMENT OF STATE<sup>2</sup>

31 requests<sup>2</sup> from the New York Times for declassification on June 5, 1972:

- (1) Early 1960 assessments by CIA, State, and NSC re Khrushchev's speech about "wars of national liberation" and the bearing on U.S. foreign policy.
- (2) State reports on Chancellor Konrad Adenauer's visit to Moscow.
- (3) All documents, including diplomatic correspondence and cables, leading up to U.S. Government efforts to obtain the release from jail of Rudolph Abel, the convicted Soviet spy, in exchange for Gary F. Powers (Feb. 10, 1962).
- (4) United States-Yugoslav relations (1948):
  - (a) U.S. Embassy reports to State early in 1948 indicating serious difficulties between the Yugoslav and Soviet Communist Parties and Governments.
  - (b) U.S. Embassy recommendations.
  - (c) Harriman-Tito conversations in Yugoslavia which led to formulation of United States policy of supporting Yugoslavia.
  - (d) Eugene Black-Tito conversations which led to World Bank support of Yugoslavia.
  - (e) United States approaches to the British, French, and Italian Governments to join in helping Yugoslavia to preserve her independence through material and political support.
  - (f) White House papers relating to the conviction that an independent Communist Yugoslavia would have far-ranging consequences for Soviet monolith control of Eastern Europe and the Western Communist Parties.
- (5) Account of negotiations by the Kennedy administration and James Donovan with Castro for the "ransom" of prisoners taken at the Bay of Pigs (Nov. 12, 1962).
- (6) Reports bearing on U.S. involvement in the assassination of Trujillo (May 30, 1961).
- (7) State reports on the founding and development of the Free University in Berlin.
- (8) The U.S. lend-lease agreement with the Soviet Union negotiated by A. Harriman; also the lists of military, industrial, and raw materials delivered to the U.S.S.R. under the agreement (1942-43).
- (9) M. Boerner's reports to State and the USIA on the reestablishment of a free press in West Germany during the period when John J. McCloy was High Commissioner (1945 on).
- (10) Reports to State and Labor Departments on how Michael Harris (AFL-CIO) and others attached to the U.S. occupation reopened the coal mines in the Ruhr with huge supplies of foodstuffs supplied by the U.S. Army (1946 on —).
- (11) State and CIA reports on the East Berlin uprising (1953).
- (12) The Thayer reports on the use of the Zittelmann Strasse house in Bad Godesberg in the early years after the Americans arrived in that town.
- (13) DOD and State reports on U.S. relations with the French resistance underground during World War II.
- (14) State reports on U.S. relations with the Italian resistance underground in Sicily and on the Italian mainland during World War II.
- (15) State and Labor department reports concerning the resurrection of the postwar Democratic West German trade unions. Specifically, the reports by Mayer Barnstein of the International Department of the AFL-CIO, who was attached to the U.S. consulate in Duesseldorf from where he searched out Democratic German leaders and helped resurrect the German Trade Union Federation as we know it today.
- (16) State papers relating to Secretary of State Byrnes' Stuttgart speech which, if it had been accepted by the Soviets, might have changed the course of postwar German history (19467).
- (17) Inside accounts and assessments of J.F.K.'s Vienna meeting with Khrushchev (June 1961).
- (18) Diplomatic dispatches from Moscow immediately after Stalin's death (Mar. 5, 1953).
- (19) Assessment of Soviet space program just before Sputnik (October 1957).
- (20) U.S. contingency plans during Hungarian crisis (October 1956-March 1957).
- (21) Copies of Kennedy-Khrushchev correspondence in 1961-62, right up to the missile crisis (October 1962).
- (22) State reports from Belgrade and Rome Embassies on secret relations between Tito and Palmiro Togliatti, the late head of the Italian Communist Party, and the latter's development of Communism "polycentrism" in opposition to Soviet control of all Communist Parties (1948-49).
- (23) State and CIA papers relating to Tito's decision to close Yugoslavia's frontier with Greece which snuffed out the Greek Communist rebellion.
- (24) Papers bearing on U.S. decision to send troops to Lebanon (July 1958).
- (25) Accounts of the relations between the White House and U.S. judges leading to the release of several Soviet spies from prison for exchange with the Russians; exchange of Francis Gary Powers for Rudolph Abel (Feb. 10, 1962); and exchange of Marvin Makinnet and Walter Ciszek for Ivan Egorov and wife (Oct. 11, 1953—but not in 10-year period).
- (26) U.S. contingency plans during Suez crisis (August 1956) plus exchanges with British and French leading up to Suez.
- (27) Reports from U.S. Ambassador in Havana throughout 1958.
- (28) Documents relating to Soviet release of the RB-47 fliers just as J.F.K. took office (1960-61).
- (29) Cable traffic leading up to Frederick E. Nolting reassignment from Ambassador to Vietnam (August 1963).
- (30) State papers relating to the American discovery of New German leadership after Germany's defeat—such men as Ludwig Erhard, who became the West German Economics Minister, Carlo Schmidt, the Social Democratic leader, Willy Brandt, etc.
- (31) State and CIA papers relating to how the Italian Communist Party's bid for power in the first postwar general election was overcome and the victory of De Gasperi assured.



Type of information requested	Date of New York Times request		Date of agency response	Nature of response
New York Times asks for declassification of foregoing 31 items.	June 5, 1972	June 27, 1972	State acknowledgement; need for more "sufficient particularity" to enable identification.	
		July 18, 1972	Finished search for Khrushchev documents, now under review. Looking for 2 others—Adenauer, plus Abel-Powers.	
		Aug. 14, 1972	Now completed search and review on 2 of the 31. Khrushchev on "wars of national liberation" and Adenauer visit to Moscow. Need more particulars on Khrushchev but Adenauer visit can be released except for part of 2 cables, 1 under review, the other one of which some is still classified. Send us \$120.80, or just \$56 plus copying cost if you want to come in and review.	
	Aug. 22, 1972	Aug. 22, 1972	State, per phone request from New York Times, returns copy of 31 requests.	
	Sept. 5, 1972	Sept. 5, 1972	New York Times gives particulars on Khrushchev speech; asks first priority on RB-47 request.	
	Sept. 6, 1972	Sept. 6, 1972	New York Times last-gasp request. "From the point of view of the Department it strikes me as regrettable that it took from June 6 to Aug. 14 for your people to ask us for the precise date of the Khrushchev speech about wars of national liberation. Given a desire to implement the Executive order, I have no doubt that the date could have been discovered * * * in 5 minutes." Reviews bidding with State.	
		Sept. 26, 1972	State says RB-47 documents will be made available. Will try to make Khrushchev papers available though Department view is that 2 "routing" summary analyses of the speech probably won't be of "much" interest to anyone "at this date." New York Times already knows that 1949-51 period of Adenauer documents can be made available. Dubious about Abel. Research leads on others. J.F.K.-Khrushchev correspondence has some declassification already.	
		Oct. 2, 1972	Yes, summary analysis of Khrushchev national liberation speech will be made available.	

## TABULATION OF THE NEW YORK TIMES' FREEDOM OF INFORMATION REQUESTS SINCE EXECUTIVE ORDER 11652—Continued

CENTRAL INTELLIGENCE AGENCY <sup>3</sup>

Type of information requested	Date of New York Times request	Date of agency response	Nature of response
9 requests:			
(1) Minutes of the "303" committee—the White House interagency body supervising CIA (and named for the NSC orders creating them; e.g., NSM 303).	June 5, 1972	June 12, 1972	CIA acknowledgment.
(2) Intelligence reports on Chinese troop movements just before Korean war (Nov. 1, 1950).	-----	June 26, 1972	Request denied; not CIA documents.
(3) Memorandums or reports providing basic justification for United States-Laos involvement (1961-62).	-----	do.-----	Request lacks "sufficient particularity."
(4) Early 1960 assessments by CIA, State, and NSC re Khrushchev's speech about "Wars of National Liberation" and its bearing on U.S. foreign policy.	-----	Aug. 23, 1972	Request denied, after more details provided by New York Times.
(5) State/CIA papers re Tito's decision to close Yugoslavia's frontier with Greece and termination of Greek civil war.	-----	June 26, 1972	Request lacks sufficient particularity.
(6) Reports on U.S. involvement in Trujillo's assassination (May 30, 1961)	-----	Aug. 23, 1972	Request denied, although additional material supplied by New York Times.
(7) Reports on U.S. relations with French underground during World War II	July 31, 1972	June 26, 1972	Unable to locate.
(8) Reports on U.S. relations with Italian underground during World War II	Aug. 7, 1972	Aug. 4, 1972	New York Times supplies more details on items 2, 3, and 5 above.
(9) Reports to CIA on East Berlin uprising and riots (1953)	-----	Sept. 27, 1972	CIA says "We're working on it."
-----	-----	do.-----	New York Times adds 3 additional requests.
-----	-----	do.-----	Request denied.
-----	-----	Aug. 9, 1972	Do.
-----	-----	Aug. 8, 1972	CIA acknowledgement of Aug. 7, 1972, New York Times letter.
-----	-----	Aug. 9, 1972	DOD says in another letter to try CIA for JCS papers re Bay of Pigs.
-----	-----	Aug. 10, 1972	New York Times asks CIA for "basic collection of documents" on Bay of Pigs.
-----	-----	Aug. 23, 1972	CIA says "We're working on it."
-----	-----	-----	New York Times replies to DOD that Government's aim seems to be evasion.
-----	-----	-----	3 requests in July 31, 1972, New York Times letter—items 2, 3, and 5—after review, are denied. CIA suggests appeal.
-----	-----	-----	New York Times requests reasons for denial in order to appeal.
-----	-----	-----	New York Times requests just JCS papers; no longer all Bay of Pigs documents.
-----	-----	-----	New York Times writes NSC official advising of fast-gasp effort re JCS papers, Abel-Powers, and RB-47.
-----	-----	Sept. 25, 1972	Bay of Pigs request, says CIA, doesn't conform with sufficient particularity requirement; intelligence documents, moreover, overlap with non-classified material and segregation of 2 not feasible; after consultation with DOD, NSC papers can't be released.
-----	-----	-----	Request denied for 3 additional requests in New York Times letter of Aug. 7, 1972; appeal suggested.
-----	-----	-----	Appeal of denial of Bay of Pigs, especially JCS part.
-----	-----	-----	Separate letter asking for declassification of CIA material on Abel-Powers swap.
-----	-----	-----	(See also Justice request of Sept. 6, 1972).
-----	-----	Mar. 14, 1973	CIA acknowledgment of Abel-Powers March 8 letter; says if no answer forthcoming in 60 days, appeal.



NATIONAL SECURITY COUNCIL <sup>1</sup>

Type of information requested	Date of New York Times request	Date of agency response	Nature of response
2 requests	June 21, 1972	Sept. 7, 1972	Max Frankel, New York Times' Washington correspondent and bureau chief, protests New York Times last-gasp effort to get RB-47, Bay of Pigs collection, Abel-Powers documents.
	Oct. 23, 1972	Oct. 13, 1972	NSC refuses to declassify Gaither report.
	Mar. 2, 1973	Nov. 6, 1972	New York Times appeals NSC refusal to interagency committee. Committee acknowledges New York Times appeal.
(2) Technological capabilities panel (TCP) report chaired by James R. Killian in 1954 or 1955 and implementative of the Gaither report.			New York Times asks for Killian TCP report. Still pending.

## DEPARTMENT OF JUSTICE

1 request: (1) All documents, including diplomatic correspondence and cables, leading up to U.S. Government efforts to obtain the release from jail of Rudolph Abel, the convicted Soviet spy, in exchange for Gary F. Powers (Feb. 10, 1962).	Sept. 6, 1972	Oct. 6, 1972	Acknowledgement, and under review.
	Mar. 8, 1973		New York Times requests Abel-Powers from CIA, which it says it now learns is source of documents.
		Mar. 14, 1973	CIA acknowledges Mar. 8, 1972 letter. Says if no answer in 60 days, well, then, appeal.
		Mar. 30, 1973	DOJ declassifies and makes available several papers on swap.

<sup>1</sup> Of 9 requests, 3 were denied, 6 were referred to other agencies.

<sup>2</sup> Of 31 requests, 3 were responded to (plus a partial response to Abel-Powers, to which Justice was more directly responsive). Of the remaining 28 requests, New York Times suspended most pending resolution of the cost problem. But New York Times paid \$194 for the 3.

<sup>3</sup> Of 9 requests, 6 were refused, 1 was directed to State, 1 to NSC, and 1 to Justice. Of the 6 CIA refusals, 5 involved documents prior to 1950.

<sup>4</sup> Of 2 requests, New York Times finally secured the Gaither report after appeal and repeal. The second request is still pending.

Senator CHILES. Mr. Bancroft, we thank you very much for your excellent statement. I think it would be very helpful in trying to compile the record on the legislation that we are proposing amending the Freedom of Information Act to include your statement.

From your experience in attempting to have the 51 historical documents declassified, can you gauge the procedural role played by the new Inter-Agency Classification Review Board created by Order 11652?

Mr. BANCROFT. I think perhaps, Mr. Belair can answer this.

Mr. BELAIR. The Inter-Agency Review Committee headed by John Eisenhower is just about the last great hope on earth as far as the Executive order is concerned. However, it takes a long time before you can exhaust the procedural requirements as laid down in the Executive order. You first have to wait 60 days for the source of the document to say no and then you must appeal to the same source Review Committee so that is another 30 days, and then—only then, after the 30 days—can you go to the Inter-Agency Committee. There is a possibility of even further delay because in the case of one of our requests the CIA had stated in their initial response, that is, the Review Committee after the agency first said no, they stated we will do our best but it will take more than 30 days for us to send a response.

Only after that exhaustive process can we appeal.

Senator CHILES. What has been your experience as to the time necessary for the Inter-Agency Review Committee to render a decision? Not the time getting there, but actually when they get it?

Mr. BELAIR. I found in the one appeal which we made it was almost shockingly expeditious—it was something like 2 weeks.

Senator CHILES. I see. So you haven't experienced any delay once you got there in the one instance?

Mr. BELAIR. Indeed, we did not. In fact, in pursuing the matter informally on the telephone with one of their representatives he said, why don't you send us more of this kind of thing because we welcome the opportunity to discharge our function and so I am waiting for the expiration of the 90 days for a couple of more.

Senator CHILES. Mr. Bancroft, do you have an estimate of what is the cost to the New York Times for these? You submitted the one bill, which you paid the Government for.

Mr. BANCROFT. Well, it was a major effort by Mr. Belair, who was assigned by the head of our Washington bureau, to follow this thing through. He has been doing this now from last June 5 right up to the present time. He had very little opportunity to do his normal work in the bureau. His byline hasn't appeared in the paper, as it normally does, lately because of his preoccupation with this task.

Mr. BELAIR. From June until November, that is true, but come November I won't say we gave that up, but from that point on it will be in other hands.

Senator CHILES. Have you considered any legal fees?

Mr. BANCROFT. Legal fees we might incur under the appeals?

Senator CHILES. That is right.

Mr. BANCROFT. No; we really haven't thought of that.

Senator CHILES. I see. In your statement, you speak of the National Security Council's staff prodding and urging the State Department and the results of that prodding. Does that indicate to you that the



National Security Council plays a special role in this classification problem generally?

Mr. BANCROFT. Yes, the National Security staff has been most helpful in the form of Mr. David Young, who is the head of the Declassification Staff.

Senator CHILES. Do you think we should consider making that role statutory? Would it be helpful to have one central agency, acting as the overall supervisor in classification and declassification of records?

Mr. BANCROFT. My own reaction to that is it should be enough where an Executive order is issued by the Chief Executive of the executive branch of the Government to tell the people in the governmental agencies what they ought to be doing. I can see great advantage, of course, in having some form of congressional oversight to see that the orders of the Executive are carried out and that might be an opportunity for some form of legislation to get Congress in on the act more than it is right now.

Senator CHILES. On another question, as you know Senator Muskie has already expressed a great concern with the administration's new proposal to recodify the Federal Criminal Code provisions which involve national security. I can see these as a great threat to the first amendment. An editorial in the Times has showed this same concern. The Attorney General has agreed to return and testify on these particular proposals, but I wonder if you have given them any study and care to comment?

Mr. BANCROFT. We had given them study, of course, before we wrote the editorial that appeared in yesterday's paper, and that does express the opinion of the Times on that proposal. We think it does trespass unacceptably on the first amendment. We think it is undoubtedly going to have a chilling effect on conscientious Government officials who necessarily in the normal work they do, establish relationships with news reporters. It is going to make investigatory reporting almost impossible and it is just a further extension of the type of secrecy in Government that we obviously do not like.

We don't want freedom of the press for the benefit of the press. We want freedom of the press for the benefit of the people, and the people under this proposed bill would not get the information that they need to understand what activities of Government are going on. It is much too broadly drafted and it would in our view require very substantial changes to bring it back into the system we have in this country.

Senator CHILES. Well, we thank you very much for your comments. A copy of the editorial was placed in the record yesterday, so that will appear.<sup>1</sup>

Mr. Miller?

Mr. MILLER. May I ask some questions?

Senator CHILES. Yes.

Mr. MILLER. Mr. Bancroft, I am not here in my capacity as a consultant to the subcommittee, but I would like to ask you a couple of questions, if I may?

Mr. BANCROFT. Certainly.

Mr. MILLER. One is the extent to which you would advocate a similar type of opening up of other branches of Government in addition to the executive branch. I take it from your comments you are speaking

<sup>1</sup> See p. 14.

mainly as to the executive. I think the Congress has certainly a problem here as well.

Senator Chiles has mentioned a couple of these problems, and I think we should recognize there is a problem with the courts as well. Would you care to comment on both the Congress and the courts—and I am speaking not so much of the judicial practices themselves, but, for example, something which your paper does not cover, namely the activities of the Judicial Conference of the United States. Would you care to comment on the application of the Freedom of Information Act in the other branches of Government as well?

Mr. BANCROFT. I think as a generality, Professor Miller, we favor all sorts of sunshine and not only sunshine in the legislative processes under Senator Chiles' bill, but sunshine in every aspect of Government. This is the essential element of democracy in this country.

As to the specific question about the Judicial Conference, I am not sure really that I know enough about it to have an intelligent comment on that.

Mr. MILLER. The working papers of the Judicial Conference on the new rules of evidence which Congress now has under consideration are not available to the public generally, I understand, or to the press. Do you think that they should be?

Mr. BANCROFT. Yes.

Mr. MILLER. That is, available to the committees that worked on the new rules of evidence?

Mr. BANCROFT. Mr. Miller, I would think, yes, there is no doubt they should be a part of this whole process. These rules of evidence are going to become part of the procedures in the Federal courts.

Mr. MILLER. These are the background papers, now, and not the rules themselves I am talking about. The reason I asked that is because I do have some specific knowledge about the fact that the judges, the courts, the administrative offices of the courts refuse to divulge this information to the public and to scholars and to the press. And I would like to think that the record should reflect that the problem exists beyond the executive branch.

A separate question I would like to pursue just a bit is the cost accounting factor. How much does it cost the New York Times to pursue one of these requests for information on a cost accounting basis, that is, all of the costs of your time, all of the cost of the executives' time, all of your auditors' time, and everything else? You are a wealthy newspaper, but would, say, the Peoria Bugle be able to afford it? That is what I am asking you?

Mr. BANCROFT. I think the answer is clearly "no." The Peoria Bugle or any other similar newspaper wouldn't. We have not made an effort to determine the cost involved in these things.

Mr. BELAIR. The Peoria Bugle to begin with could not make the commitment that we have made with a test in mind. In other words, the way the Executive order works, you state in writing that you will assume all costs of identification, location, and review. Of course when it gets up to topside that fellow doesn't work—

Mr. MILLER. Excuse me, but in other words, we are talking about freedom of information for the wealthy members of the media only?

Mr. BANCROFT. We have complained about it as strongly as we can. The shoe should be on the other foot, namely that those who misclassify it should bear the expense of correcting the error.



Mr. MILLER. All right, that leads to my final question. This I know will probably hit you cold as such, but Senator Chiles is aware of the provisions in the impoundment control bill which provides that a lawyer for the General Accounting Office as the representative of Congress, contest specific impoundments. What would be your position on establishing a similar lawyer? In other words, a sort of lawyer for the people paid for by public funds to contest specific refusals of information?

Mr. BANCROFT. Well, I think we would favor it very strongly. I mean, we thought it was totally unconscionable and unacceptable for the State Department which was the agency involved in the particular case we had, to make us give them an open-ended commitment that we would pay whatever costs were incurred by the State Department in researching the documents that we asked for. We were told by the people in the Department of State that this would be in the thousands of dollars and might very well run into five figures. We didn't know what the cost was going to be. We wanted the documents——

Senator CHILES. I might say, we have some testimony before the Appropriations Committee on the Freedom of Information Act in a couple of situations where they decided they were going to see what kind of information they could get in regard to background papers and in-house documents that govern how you collect money and what procedures you would take and how you would compromise a claim and they did stand in the thousands of dollars to obtain this testimony, this information; most of which should have been readily available.

Mr. MILLER. Thank you.

Senator CHILES. Thank you very much.

We will adjourn our hearing until 10 o'clock tomorrow morning.

[Whereupon at 1:10 p.m., the subcommittees recessed to reconvene at 10 a.m., Thursday, April 12, 1973.]





# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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THURSDAY, APRIL 12, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; SUBCOMMITTEE ON ADMINISTRATIVE  
PRACTICE AND PROCEDURE, COMMITTEE ON THE JUDI-  
CIARY,

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 6202, Dirksen Senate Office Building, Senator Edward M. Kennedy presiding.

Present: Senators Kennedy, Ervin, Muskie, and Roth.

Also present: Rufus L. Edmisten, chief counsel and staff director; Telma P. Moore, executive assistant; Walker F. Nolan, Jr., counsel; Joe L. Pecore, assistant counsel; Alexander M. Bickel and Arthur S. Miller, consultants, subcommittee on Separation of Powers; Thomas M. Susman, assistant counsel, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary; Alvin From, staff director; Alfred Friendly, Jr., counsel; Lucinda T. Dennis, chief clerk, Subcommittee on Intergovernmental Relations, Committee on Government Operations.

Senator KENNEDY. The committee will come to order.

## OPENING STATEMENT OF SENATOR KENNEDY

Despite attempts by the Executive to relegate Congress to the position of a lesser branch of Government, our skillfully molded constitutional scheme contemplating checks and balances among the three co-equal branches seems to be withstanding substantial attack.

Two months ago a Justice Department spokesman advocated at a Senate hearing the theory that the President has the inherent power to impound appropriated funds, regardless of the mandates of Congress and the express terms of the Constitution. Congressional committee chairmen joined a lawsuit challenging the President's impoundment of highway funds, and the judiciary began to return the scales to balance: The Federal courts have now ruled the administration's impoundment action unlawful.

During the past few months the administration has been attempting prematurely to dismantle OEO, a program established by Congress to remain operational at least until the end of June. Yesterday the Federal courts upheld the will of Congress and ruled that this Executive action contravened its mandates. The untimely destruction of OEO was enjoined.

Just this past Tuesday the Attorney General proposed to these committees a theory of executive privilege that would allow the President to exercise completely unchecked and unreviewable control over the withholding of witnesses and documents from congressional examination. Founded in neither reason nor law nor history, this theory threatens again to throw out of kilter the usually cooperative and balanced relationship between the legislative and executive branches.

There will be a confrontation, but I believe that again the ultimate battle may be before the third branch—the Federal judiciary. Mr. Nixon has suggested a court test of his assertion of privilege, and so do I.

But I think Congress can pave the way for this battle. Congress can define the jurisdiction of the Federal courts and give standing to aggrieved parties so that those courts might fashion appropriate remedies. In recent years Congress has more frequently written into laws provisions which allow private parties to take their cases against the executive branch to court. The Freedom of Information Act is one such law. In that act, which is one of the focal points of these hearings today, Congress responded to the public outcry—reflected in a 1951 report to the American Society of Newspaper Editors—that there was “No enforceable legal right in the public or press to inspect any Federal nonjudicial record.” Congress’ response took the form of section 3(c) of the Freedom of Information Act, providing that “on complaint, the district court of the United States \* \* \* has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint.”

I would like to suggest for the consideration of these committees, and invite response to this proposal from the witness today, that Congress consider passing legislation explicitly granting jurisdiction in the Federal courts to hear claims by Congress of executive abuse of the privilege doctrine, giving power to the courts to order production of records or witnesses improperly withheld from Congress, and providing standing to congressional committees to sue in their own names to compel such production of records or witnesses. The standing rules of the Senate already authorize a committee to bring lawsuits “if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it.” This rule further allows the committee to be represented by such attorneys as it may designate. To eliminate possible complexities, the rule should probably be amended to allow the committee to sue in its own name rather than in the name of the United States.

It seems to me that this would be entirely constitutional, since Congress would not be attempting to impose on the executive its substantive views as to the scope and limitations, or even existence, of an executive privilege. The courts would decide this issue. Committees, I believe, would not abuse this process; and while an individual member could not utilize this act to obtain withheld information, neither would the process of the entire Congress or even one House be necessary to facilitate its use. The judiciary would be asked only to fulfill its traditional role in ruling on the respective powers of Congress and the executive under the Constitution.



Perhaps when we have some of our distinguished witnesses here this morning, Congressman Moorhead and others who have given thought to this whole question, they might be prepared to react to this suggestion.

Senator Thurmond is at an Armed Services Committee meeting, and he has an opening statement. We will place that in the record at this point.

[The statement of Senator Strom Thurmond follows:]

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, I am pleased to take part in this joint meeting of the Administrative Practice and Procedure Subcommittee, the Separation of Powers Subcommittee, and the Intergovernmental Relations Subcommittee as we examine the issues of freedom of information, governmental secrecy, and executive privilege.

As ranking minority member of the Administrative Practice and Procedure Subcommittee, which exercises oversight responsibilities for the Freedom of Information Act, I will direct my remarks primarily to this issue.

In 1822, James Madison succinctly pointed out that a fundamental premise of our representative form of government involves the free flow of information to the public. President Madison wrote: "... a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government, without popular information or the means of requiring it, is but a prologue to a farce or a tragedy or both."

Mr. Chairman, the Freedom of Information Act, as embodied in 5 U.S.C. Sec. 552, represents an effort to require the availability of executive branch records to the public. Specific exemptions are necessarily made for the interests of national security, internal practices of an agency, confidential and privileged information, unwarranted invasions of personal privacy, and law enforcement investigatory files. I do not think that any reasonable man can deny that certain governmental activities must be carried out privately. As a retired Major General in the Army and the ranking minority member of the Senate Armed Services Committee, I can attest to the need for governmental privacy in national security matters.

I do not believe that any reasonable man can question the general spirit of a law which protects the public's right to know about its government's functions.

Reasonable men can differ, however, in how to balance the people's need to know with the dangers of disclosure. They can differ in the methods used to decide what information should be withheld or released, and in how to keep bureaucrats from employing their authority as a political weapon. The Freedom of Information Act and its application raise complex and legal and administrative questions.

The right of the public to have access to unclassified and unprivileged material is not a partisan matter. This right transcends political affiliations and ideological beliefs which are commensurate with our form of government. It is totally alien to our way of life to allow the government to manage the news or to make decisions without public accountability. Instances of withholding governmental information from the public must be the exception, and not the general rule; and such instances must be tolerated only when there is a compelling national interest such as national security or the other grounds enumerated in the Freedom of Information Act.

As we analyze the effectiveness of this law, our ultimate objective should be fourfold.

First, we must anticipate methods to clarify the vague language of the statute in order to make it more responsive to an open society. We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often, the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted. For this reason, we should study the feasibility of recovery of reasonable attorneys' fees and costs in the discretion of the Court.

Secondly, we should study the effect of any unreasonable encumbrances on the governmental process by requests for information.

Thirdly, we should look into the problem of the time factor and encourage timely action on requests for information. Often the lapse of time or unjustifiable delay renders the information useless. Time limits for responses to requests, denials, or appeals deserve careful consideration.

Fourthly, if we expect the executive departments to respond in an effective manner to the mandate of the law, we should look into the problem of professional manpower. We should examine the need for greater manpower to implement the Act.

Mr. Chairman, I have cited only a few of the problems that, in my judgment, we should consider in examining the Freedom of Information Act. Other problems, such as search fees, coordination of efforts among the executive agencies, and requirements for reasonably identifiable requests, deserve our attention.

The continued success and desirability of this law depend upon the effective implementation of procedures to strike the balance between the right of the people to know and the necessity for government to conduct some of its affairs in private.

The substantive rule provides for this balance, but the procedural rules are just as important. To overload the agencies with undue procedural requirements will thwart their effectiveness, but a failure to provide the public with proper avenues of redress will impede the substantive mandate.

I am convinced that a well-informed citizenry is the best safeguard against tyranny. Conversely, a bureaucrat, whose work is immune from public scrutiny, can hold the power to stifle individual liberty.

The recommendations which we derive from these hearings can prove to be a catalyst for improving the Freedom of Information Act. I am hopeful this will be the result.

Senator KENNEDY. Our first witness this morning is Congressman William S. Moorhead, Chairman of the House Subcommittee on Foreign Operations and Government Information. Congressman Moorhead became chairman of that subcommittee, which has the counterpart jurisdiction in the House to the Senate Administrative Practice Subcommittee, in April 1971 and has held extensive hearings on Government information issues over the past 2 years. Congressman Moorhead is the author of the proposed amendments to the Freedom of Information Act, which I joined Senator Muskie in introducing in the Senate, and brings to this hearing considerable expertise on the subjects we are considering.

We welcome you here this morning.

I understand you had 14 days of hearings. Congressman, in the House of Representatives on this. We admire you for your diligence and hard work, and look forward to what I am sure is enormously informed testimony.

#### **STATEMENT OF HON. WILLIAM S. MOORHEAD, CHAIRMAN, FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, U.S. HOUSE OF REPRESENTATIVES**

Mr. Moorhead. Mr. Chairman, our subcommittee has held a lot of hearings in this area. I don't know that we have produced lasting results, although I think your comment on the court decision of today may be a symbol that the pendulum swinging toward abuse of the executive power may be turned around. I certainly hope that is so.

Mr. Chairman, I greatly appreciate the opportunity to testify at this joint meeting of these important subcommittees today on a subject which is central to the basic concept of democracy. At no time in recent years has the problem of Government secrecy so pervaded our



political process. The tug-and-pull between the executive and legislative branches which is built into our system serves a useful function if normal checks and balances are operational and unimpaired.

No matter what political party is in control, the free flow of information necessary in a democratic society is not an issue of political partisanship. Administrations have historically abused their power to control public and congressional access to the facts of government. Administrations of both parties have claimed some form of an executive privilege to hide information. The conflict is not on partisan political grounds but on constitutional grounds between the legislative and executive branches of Government. An indication of this is the fact that eight Republican members of our committee have co-sponsored legislation to limit or restrict the use of executive privilege.

And I understand that the leader of the Republican conference in the House came to testify before these subcommittees yesterday, again indicating that this is not a partisan political issue.

But this administration has reversed the trend away from the most blatant abuses of executive privilege. This administration has turned our system of Government backward, back down the path which leads to an all powerful political leader—call him president, dictator, or king—who arrogates unto himself the right to know and against the elected representatives of the people whether in a parliament or a congress.

A recent Congressional Research Service study made for the House Foreign Operations and Government Information Subcommittee points out that the growth of the claim of executive privilege to hide the facts of Government really began in 1954 during the Eisenhower administration. I would like to submit a copy of this study for the record.

[See "The Present Limits of 'Executive Privilege'." Appendix, Volume III of these hearings, Executive Privilege. Part 3, Congressional Reports and Research.]

Congressman John E. Moss, the former chairman of our subcommittee, was responsible for convincing three Presidents to limit the use of executive privilege to a personal claim of power, and the claim was used sparingly against the Congress by Presidents Kennedy and Johnson.

The CRS study reveals that President Nixon has thus far, set an all-time record in utilizing the dubious doctrine of executive privilege. It also shows that, despite his written assurance to our subcommittee in April 1969 that he would adopt the same Kennedy-Johnson ground rules limiting its use, such rules have been violated by administration subordinates at least 15 times.

I have always felt that, while the Executive has no inherent right to withhold anything from the Congress, a spirit of comity and recognition of the need for certain confidences and privacy between the branches has led the Congress to recognize privileged communications between the President and his closest advisers. This is the way it should be—but only if this spirit of cooperation is not abused by either branch.

Unfortunately, the present administration has built a stone wall between itself and the Congress. This wall, much like the one in Berlin, has grown stone by stone until on March 12, 1973, Mr. Nixon capped it off with an amazing "blanket privilege" proclamation, extending to the entire executive branch. As I understand the new theory, it applies

to all past, present, and future White House aides who might be summoned to testify before congressional committees. Thus, if a President wanted to keep secret the number of roses in the White House garden in the interests of national security, under the Nixon claim, he could invoke the privilege on behalf of his close "personal adviser," the White House gardener, and, according to a Justice Department witness before our subcommittee, this decision would not be subject to review by Congress or court.

Incidentally, at that point, Mr. Chairman, I think that at the very least your suggestions that these claims should be reviewable by a court is far preferable to the present claim of the Justice Department that the Executive's decision is final and not subject to review. This is, I think, really arrogating to himself the rule of man instead of the rule of law.

Such White House policies and claims are as ridiculous as their claims that executive privilege is an historical doctrine that dates back 200 years.

Mr. Chairman, before turning to a discussion of freedom of information matters, I must comment on the amazingly arrogant performance by the Attorney General before this panel last Tuesday and on his exposition of the administration's doctrine of the "divine right" of the Presidency. I submit that this is a doctrine of monarchical origin at best, or at worst, a totalitarian dogma espoused by "banana-republic" dictatorships.

Our system of government places the ultimate power in the hands of the people. Congress is the people's representative in the exercise of that power for the public good. All of us have been elected by our constituencies and have taken an oath to carry out that solemn obligation. Unless they have changed the law school curriculum since my day, ours is still a government of laws, not men. I never thought the day would come when any Attorney General of the United States could have the audacity to proclaim that, in effect, Congress had no power to order any employee of the executive branch to appear and testify before Congress if the President—in his almighty wisdom—barred such testimony.

Only two persons—the President and Vice President—of the millions who make up the vast bureaucracy of the executive branch of our Government are elected by the people of the United States. At that, they are elected indirectly through the electoral college system and only once every 4 years. All other executive branch officials are appointive—the result of congressional action in the establishment and funding of Federal programs which they administer. This includes the countless number of politically appointed bureaucrats as well as the faceless civil servants who exercise life-and-death power in administering Federal programs under authority delegated to the Executive by the Congress. They have always been and must always be responsible to Congress because they are the creatures of Congress—not the Executive. They are the servants of the people and the people's representative—not their masters.

The Attorney General was the administration spokesman chosen to assert the "divine right" of the Presidency. As we all recall, it was not too many months ago that many in this body raised serious questions during the hearings on the nomination concerning his qualifica-



tions for the office. It is ironic, in view of the sweeping claims he has enunciated here, that it was only after the President "permitted" his assistant, Mr. Peter Flanigan, to appear before the Judiciary Committee to discuss the administration's handling of the ITT anti-trust case that the log-jam was broken and the Attorney General's nomination was finally cleared for floor action. If the "divine right" doctrine had been in effect last year, it might be that someone else might be warming the seat of the Attorney General's chair today.

As the chairman of an investigating subcommittee of the House Government Operations Committee, I submit that it is absolutely essential for the Congress to have full access to all information and all executive branch employees if we are to be able to perform our vital role as a "watch-dog"—with teeth—to make certain that the representatives of the people are able to carry out our oversight duties as well as to perform our legislative functions required under the Constitution.

I would direct the committee's attention, and particularly the attention of Senator Ervin in his Watergate investigation role, to House Report No. 394 of the 36th Congress. It is dated April 9, 1860. It involved the appointment of a special five-member committee of the House for the purpose of investigating whether the President of the United States—not an aide to the President—whether the President—Buchanan—or any other officer of the Government had by money, patronage or other improper means, sought to influence the action of Congress. And it provides further that as a result of certain statements of the President in his letter to the Pittsburgh centenary celebration of November 25, 1858 in which he referred to the employment of certain moneys in elections:

Said committees shall inquire into and ascertain the amount so used in Pennsylvania and any other State or States, in which districts it was expended, and by whom and by whose authority it was done, and from what source the money was derived, and to report the names of the parties implicated, and that for the purpose aforesaid said committee shall have the power to subpoena persons and papers and report at any time.

It is interesting to note that this report also stated that "the President affirms with seeming seriousness in comparing himself with the House of Representatives that 'as a coordinate branch of government' he is their equal."

The report continued: "This is denied in emphatic terms. He is coordinate, but not coequal." The report concludes that "the Congress has more power and privilege than does the President," rather than the present practice Mr. Chairman, which seems to place the President in a superior position to the Congress.

While the thrust of these hearings today is the right of Congress to receive information from the Executive, I am most pleased that this panel is also considering the public's "right to know" what its government is doing. In this regard, I wish to now turn to a discussion of S. 1142 and H.R. 5425, amendments to the Freedom of Information Act, which I have sponsored in the House with some 42 other Members of both parties and which the chairmen of these three Senate subcommittees and other distinguished Senators are sponsoring over here.

At this point, Mr. Chairman, instead of reading the full statement, I will summarize it and ask that the full statement be included in the record.

Senator KENNEDY. It may be so done.

Mr. MOORHEAD. In the statement I have a section by section analysis of both the Senate and the House bills. I will merely touch upon those.

Section 1(a) deals with the requirement that agencies publish and distribute their opinions in the adjudication of freedom of information cases.

Section 1(b) closes the loophole that many agencies have used where they require "identifiable records," and changes that to "reasonably describes such records," because oftentimes members of the public cannot specifically identify a record.

Section 1(c) provides a specific time period for action on freedom of information requests. It provides 10 working days to reply to an original request, 20 working days for an appeal from a decision to deny the information.

Section 1(d) is also quite important. It clarifies the present requirement that the district courts examine contested information de novo by requiring that in all cases the de novo examination include an examination of the contents of the record in camera to determine if the record must be withheld under the exemption or exemptions claimed by the agency.

The second requirement specifically directed to the present section 552(b)(1) of the act directs the courts to look into the contents of documents considered exempt for reasons of national defense or foreign policy in order to determine if the contested documents should, in fact, be withheld under this exemption.

This new section is made necessary by the decision of the Supreme Court in *EPA v. Mink*<sup>1</sup> decided in January of this year. In this case the Supreme Court held that judges may not examine in camera classified documents, and thus exempt under section 552(b)(1), and need not, at their discretion, examine the contents of documents claimed exempt under section 552(b)(5).

The import of this decision by the Supreme Court is to allow the Government to claim merely by affidavit that certain material is exempt from the public.

In our many days of hearing on classification we saw many cases where the use of the classification stamp was simply ridiculous.

Section 1(e) of the bill deals with foot-dragging by Federal agencies in freedom of information litigation. In effect it would make the Government reply to a complaint filed in court in the same 20-day time limit that is required for private litigants.

Section 2, section 2(a) of the bill amends present subsection (b)(2) by clarifying the original intent of Congress that only personnel rules and internal personnel practices are exempt from mandatory disclosure. The language exempts only those internal personnel rules and practices, the disclosure of which would unduly impede the functions of such agency."

Section 2(b) of the bill applies to trade secrets and financial information. And it limits it to only those items of information which are "privileged and confidential."

Section 2(c) is technical. It amends the word "files" to say "records," because we found in our hearings that some agencies would commingle records in a single file and then claim that the whole file was hence exempt, even though certain records in it were not.

<sup>1</sup> See Appendix, Volume III of these hearings, Freedom of Information, Part 2, Court Decisions.



Section 2(d) would again substitute the word "records" for "files." This new section would also narrow the exemption to require that such records be compiled "for a specific law enforcement purpose, the disclosure of which is not in the public interest."

It also enumerates certain categories of information that cannot be withheld under this exemption, such as scientific reports, tests, data, inspection reports relating to health, safety, or environmental protection, or records serving as a basis for a public policy statement by an agency officer or employee of the U.S. or serving as a basis for rule-making by an agency.

Subsection (c) of the present act would also be strengthened by language in the two bills. The present section merely states that "this section is not authority to withhold information from the Congress." Additional language has been added in these amendments to clarify the position that Congress, upon a written request to an agency, be furnished all information or records by the Executive that is necessary for Congress to carry out its functions.

And finally, a new subsection (d) would be added to the present act. Subsection 4 of the bill establishes a mechanism for congressional oversight of the Freedom of Information Act by requiring annual reports from each agency on their record of administration of the act, requiring the submission of certain types of statistical data, changes and regulations, and other information of Federal agencies that will indicate the quality of administration of their information programs.

Mr. Chairman, I am convinced that these amendments can help reverse the dangerous trend toward closed government that threatens our free press, our free society, and the efficient operation of hundreds of important programs enacted and funded by the Congress. It will help restore the confidence of the American people in their Government and its elected leadership by removing the veil of unnecessary secrecy that shrouds vast amounts of Government policy and action. We must eliminate to the maximum extent possible Government preoccupation with secrecy, because it cripples the degree of participation of our citizens in governmental affairs which is so essential under our political system. Government secrecy is the enemy of democracy. Secrecy subverts and will eventually destroy any representative system.

The enactment of this legislation by this Congress will make it far more difficult for the Federal bureaucrats to withhold vital information from the Congress and the public.

I thank you.

[The full statement of Representative Moorhead follows:]

#### PREPARED STATEMENT OF HON. WILLIAM S. MOORHEAD

Mr. Chairman, I greatly appreciate the opportunity to testify at this joint meeting of these important subcommittees today on a subject which is central to the basic concept of democracy. At no time in recent years has the problem of government secrecy so pervaded our political process. The tug-and-pull between the Executive and Legislative branches which is built into our system serves a useful function if normal checks and balances are operational and unimpaired.

No matter what political party is in control, the free flow of information necessary in a democratic society is not an issue of political partisanship. Administrations have historically abused their power to control public and Congressional access to the facts of government. Administrations of both parties have claimed some form of an "executive privilege" to hide information. The conflict is not on partisan political grounds but on Constitutional grounds between the legislative and executive branches of government. An indication of this is the fact that eight

Republican members of our committee have cosponsored legislation to limit or restrict the use of "executive privilege."

But this administration has reversed the trend away from the most blatant abuses of "executive privilege". This administration has turned our system of government backward, back down the path which leads to an all powerful political leader—call him president, dictator or king—who arrogates unto himself the right to know and against the elected representatives of the people whether in a Parliament or a Congress.

A recent Congressional Research Service study made for the House Foreign Operations and Government Information Subcommittee points out that the growth of the claim of "executive privilege" to hide the facts of government really began in 1954 during the Eisenhower Administration. I would like to submit a copy of this study for your record.

Congressman John E. Moss, the former chairman of my subcommittee, was responsible for convincing three presidents to limit the use of "executive privilege" to a personal claim of power, and the claim was used sparingly against the Congress by Presidents Kennedy and Johnson.

The CRS study reveals that President Nixon has, thus far, set an all-time record in utilizing the dubious doctrine of "executive privilege". It also shows that, despite his written assurance to our subcommittee in April, 1969 that he would adopt the same Kennedy-Johnson groundrules limiting its use, such rules have been violated by Administration subordinates at least 15 times.

I have always felt that, while the Executive has no inherent right to withhold anything from the Congress, a spirit of comity and recognition of the need for certain confidences and privacy between the branches has led the Congress to recognize privileged communications between the President and his closest advisors. This is the way it should be—but only if this spirit of cooperation is not abused by either branch.

Unfortunately, the present Administration has built a stone wall between itself and the Congress. This wall, much like the one in Berlin, has grown stone by stone until on March 12, 1973, Mr. Nixon capped it off with an amazing "blanket privilege" proclamation, extending to the entire Executive branch. As I understand the new theory, it applies to all past, present, and future White House aides who might be summoned to testify before Congressional committees. Thus, if a President wanted to keep secret the number of roses in the White House garden in the interests of national security, under the Nixon claim, he could invoke the privilege on behalf of his close "personal advisor", the White House gardener, and, according to a Justice Department witness before my subcommittee, this decision would not be subject to review by Congress or court. Such White House policies and claims are as ridiculous as their claims that "executive privilege" is an historical doctrine that dates back 200 years.

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the creatures of Congress—not the Executive. They are the *servants* of the people and the people's Representative—not *their masters*.

The Attorney General was the Administration spokesman chosen to assert the "divine right" of the Presidency. As we all recall, it was not too many months ago that many in this body raised serious questions during the hearings on his nomination concerning his qualifications for the office. It is ironic, in view of the sweeping claims he has enunciated here, that it was only after the President "permitted" his assistant, Mr. Peter Flanigan, to appear before the Judiciary Committee to discuss the Administration's handling of the ITT anti-trust case that the log-jam was broken and the Attorney General's nomination was finally cleared for floor action. If the "divine right" doctrine had been in effect last year, it might be that someone else might be warming the seat of the Attorney General's chair today.

As the chairman of an investigating subcommittee of the House Government Operations Committee, I submit that it is absolutely essential for the Congress to have full access to all information and all Executive branch employees if we are to be able to perform our vital role as a "watch-dog" (with teeth) to make certain that the Representatives of the people are able to carry out our oversight duties as well as to perform our legislative functions required under the Constitution.

While the thrust of these hearings is the right of Congress to receive information from the Executive, I am most pleased that this panel is also considering the public's "right to know" what its government is doing. In this regard, I wish to now turn to a discussion of S. 1142 and H.R. 5425, amendments to the Freedom of Information Act, which I have sponsored in the House with some 42 other Members of both parties and which the chairmen of these three Senate subcommittees and other distinguished Senators are sponsoring over here.

Just about seven years ago, the Congress passed the Freedom of Information Act. In many ways this is an historic piece of legislation, because for the first time it was legally recognized that Government information is public information available to everybody without the need to show a special interest or need to know. This was a unique legislative proposition which, as far as I know, is not yet recognized anywhere else in the Western world. It is my understanding that Canada, Australia, and some Western European countries are now closely studying our Freedom of Information Act.

While the Freedom of Information Act presumed the public availability of *all* government information, it also recognized that *some* information must necessarily be withheld from the general public because its release could truly damage the national defense or foreign policy, or because release of the information could compromise individual privacy, abridge a property right, inhibit a law enforcement investigation, or seriously impede the orderly functioning of a government agency. In order to provide the fullest possible access to public records, however, the Congress clearly put the burden on the government to prove the necessity for withholding a document and *clearly indicated that an exemption from public release of a document was permissive and not mandatory*.

Some five years after the effective date of this act, the House Foreign Operations and Government Information Subcommittee held comprehensive investigatory hearings on the administration of the Freedom of Information Act. Our fourteen days of hearings and other investigative work showed conclusively that the administration of the Freedom of Information Act by the Executive branch fell seriously below the standard expected by the public and the Congress. The major problem areas fell into the following categories:

- (1) the Executive's refusal to supply information by use of the exemptions in the Act was the rule rather than the exception;
- (2) long delays in responding to requests often made the information useless once provided;
- (3) delaying tactics during litigation extended both the time and the costs to the individual citizen beyond reason; and
- (4) lack of technical compliance with the requirements of the Act, as interpreted by the agency, often led to a refusal to supply requested information.

In sum, Mr. Chairman, the Congress mandated that the Government supply *all* requested information to the public except within certain limited areas of permissive exemption. The Executive branch has generally rejected this basic mandate and, instead, has relied in large part on bureaucratic subterfuge to defeat the purposes of the Act.

I should state, however, that the picture is not all black. The Government Operations Committee report of last September (H. Rept. 92-1419), based on our hearings, recommended a number of remedial administrative reforms. I am pleased to note that many agencies have already adopted some of them. However, administrative reforms within the agencies are not enough. Experience with the Freedom of Information Act shows the need for substantive amendments to the Act itself to strengthen and clarify its provisions. They are contained in the legislation now before this subcommittee.

#### SECTION-BY-SECTION ANALYSIS OF S. 1142 AND H.R. 5425

Mr. Chairman, let me now turn to a discussion of the major provisions of this measure—S. 1142 and H.R. 5425.

Section 1(a) provides that agencies must take the affirmative action of publishing and distributing their opinions made in the adjudication of cases, their policy statements and interpretations adopted, and the administrative staff manuals and instructions which are available to the public. The present requirement that this information be made available for inspection and copying has not been adequate inducement to most agencies to actually make this information available in useful form.

Section 1(b) provides that agencies will be required to respond to requests for records which "reasonably describes such records." This substitutes for the present term "identifiable records" which some agencies have interpreted as requiring specific identification by title or file number—generally unavailable to the person making the request. I feel that any request describing the material in a manner that a government official familiar with the area could understand is sufficient criteria for identification purposes.

Section 1(c) provides for a specific time period for agency action on freedom of information requests. The present act contains no such time limits for the government to respond. The hearings showed that many requests went unanswered for periods of thirty days to six months. This new section will require the agency to respond to original requests within 10 working days and appeals of denials within 20 working days. These time periods are based on portions of Recommendation No. 24, issued by the Administrative Conference of the United States after a study of the Act in 1971. Under our proposed new section the agency is not required to actually forward the information within the ten-day time period, for we recognize that in many cases the requested information may legitimately take more time to obtain from regional offices. However, the agency will be required to respond within ten days—either by making the information available or indicating whether or not the information will be made available as of a certain date; if the determination is that it cannot be provided, the agency response must state the specific reasons. Administrative appeals must be acted upon within the twenty-day limit. Two agencies, the Departments of Health, Education, and Welfare and Justice, have already amended their regulations to require responses within the ten-day period, as recommended. I feel that other agencies will not be burdened by such a statutory requirement.

Section 1 (d) clarifies the present requirement that the District courts examine contested information *de novo*, by requiring that in *all* cases the *de novo* examination include an examination of the contents of the records *in camera* to determine if the records must be withheld under the exemption or exemptions claimed by the agency. A second requirement specifically directed to the present section 552(b) (1) of the Act directs the courts to look into the contents of documents considered exempt for reasons of national defense or foreign policy in order to determine if the contested documents should, in fact, be withheld under this exemption. This new section is made necessary by the Supreme Court decision in *EPA v. Mink* (410 U.S. —) decided on January 22, 1973. In this case the Court held that judges may not examine *in camera* classified documents and thus exempt under section 551(b) (1) and need not, at their discretion, examine the contents of documents claimed exempt under section 552(b) (5).

The import of this decision is to allow the government to claim, merely by affidavit, that certain material is exempt from the public. This would effectively destroy the judicial oversight so necessary to the adequate functioning of the Freedom of Information Act. Original sponsors of the freedom of information legislation have always felt that the *de novo* requirement in the Act required a true examination of the records by the courts. This amendment will clearly spell out that original Congressional intent and requirement.



It has been argued that this requirement might put an excessive burden on the courts if they are forced to examine each contested document. I do not think this is the case. During five years of litigation under the Act, the District courts have evidenced no problems in examining the contested documents claimed exempt by Federal agencies under sections 552 (b) (2) through (9). While there has been a reluctance to examine *in camera* those documents classified for alleged "national security" reasons, I do not feel that the requirement of judicial examination will place any unnecessary burden on the courts. As many of us in the Congress realize, the security classification system is a nightmare of inconsistency, overclassification and overprotection of many documents which, if made available to the public, would only expose official incompetence rather than official secrets. If the Freedom of Information Act is to achieve its desperately needed level of effectiveness, the judgments of the Federal agencies must be subject to meaningful oversight both by Congress and the courts.

Section 1(e) deals with foot-dragging by Federal agencies in freedom of information litigation. The problems encountered by administrative delays in response to requests has been compounded by delaying tactics during litigation. Under the Federal Rules of Civil Procedure the government is allowed 60 days to respond to complaints. However, a study made for our hearings of cases filed in the U.S. District Court for the District of Columbia showed that, in 20 out of 31 cases, the *first* responsive motion by the government was not filed even within the 60-day limitation, one case taking 137 days for the government to respond. Theoretically, the government should be able to respond to a complaint in very short time, for it should be assumed that if the administrative appeal denial was properly made, the defendant agency has already fully researched the law and developed a sound case for the denial.

Under a 1969 memorandum of the Attorney General, all administrative denials which could result in litigation, in the opinion of the agency, must be discussed with the Office of Legal Counsel of the Department of Justice—*prior* to issuing the final denial. Thus, both the agency and the Department of Justice should be ready to defend an action by the time the administrative process is completed. For this reason, this legislation would require the government to respond to complaints within 20 days—the *same time* allotted private parties under the Federal Rules of Civil Procedure. The amendment would also allow the courts to award costs and attorneys' fees to successful private litigants. One of the bars to litigation under the Act is the high cost of carrying through a Federal court suit. There is ample precedent in civil rights cases for the award of costs and fees to prevailing parties, and I feel that this authority in the hands of the court would clearly be in the public interest.

As I have previously stated, Mr. Chairman, the tactics often employed to defeat the purposes of the Freedom of Information Act include delay, unreasonable fees, and unreasonable identification requirements under subsection (a) of the present act as well as overly restrictive and often incorrect interpretations of the exemption provisions in subsection (b) of the Act.

We are hopeful that the amendments to subsection (a) of the Act will correct most of the procedural abuses. The amendments to subsection (b) which I will now discuss are designed to clarify the original intent of the Act by limiting, as much as possible, the types of information which can properly be withheld by Federal agencies.

#### ANALYSIS OF SECTION 2

Section 2(a) of S. 1142 & H.R. 5425 amends present subsection (b)(2) by clarifying the original intent of Congress that only internal personnel rules and internal personnel practices are exempt from mandatory disclosure. Some agencies have interpreted the current language as exempting internal personnel rules and *all* agency practices. A new provision has also been added which further restricts the scope of the exemption by exempting *only* those internal personnel rules and internal personnel practices, the disclosure of which would "unduly impede the functioning of such agency." This additional language will further restrict the types of information that can be claimed by an agency as being exempt from disclosure.

Section 2(b) of the bill amends present subsection (b)(4) by clarifying the present vague language in the Act. Under the proposed new language, the exemption would apply only to trade secrets which are "privileged and confidential" and financial information which is "privileged and confidential." The present section in the Act has been interpreted by the Department of Justice to exempt information which may be considered trade secrets, confidential financial in-

formation, other types of nonconfidential financial information, and other information neither confidential nor financial but which was obtained from a person and considered "privileged."

Section 2(c) of the bill amends present section (b)(6) by limiting its application to medical and personnel "records" instead of "files" as in the present Act. This will close another loophole we have noted in our studies whereby releasable information is often commingled with confidential information in a single "file" and therefore all information contained in that "file" has been withheld.

Section 2(d) of the measure amends present section (b)(7) of the Act by substituting "records" for "files" as in the prior amendment. The new section would also narrow the exemption to require that such records be compiled for a "specific law enforcement purpose, the disclosure of which is not in the public interest." It also enumerates certain categories of information that cannot be withheld under this exemption such as scientific reports, tests, or data; inspection reports relating to health, safety or environmental protection, or records serving as a basis for a public policy statement of an agency, officer or employee of the United States, or which serve as a basis for rule-making by an agency.

The present investigatory file exemption is often used as a "catch-all" exemption by some Federal agencies to exempt information which may otherwise be available for public inspection, but which is held within a "file" considered to be investigatory. The new language will protect that information necessary to be kept confidential for legitimate investigatory purposes, while requiring the release of that information which, in itself, has no investigatory status other than its inclusion within a so-called investigatory file.

Subsection (c) of the present Act would also be strengthened by language in S. 1142 & H.R. 5425. The present section merely states that "... This section is not authority to withhold information from Congress." Additional language has been added in these amendments to clarify the position that Congress, upon written request to an agency, be furnished all information or records by the Executive that is necessary for Congress to carry out its functions.

Finally, a new subsection (d) would be added to the present Act. Section 4 of the bill establishes a mechanism for Congressional oversight of the Freedom of Information Act by requiring annual reports from each agency on their record of administration of the Act, requiring the submission of certain types of statistical data, changes in regulations, and other information by Federal agencies that will indicate the quality of administration of their information programs.

Mr. Chairman, I am convinced that these amendments can help reverse the dangerous trend toward "closed government" that threatens our free press, our free society, and the efficient operation of hundreds of important programs enacted and funded by Congress. It will help restore the confidence of the American people in their government and its elected leadership by removing the veil of unnecessary secrecy that shrouds vast amounts of government policy and action.

We must eliminate, to the maximum extent possible, government preoccupation with secrecy because it cripples the degree of participation of our citizens in governmental affairs that is so essential under our political system. Government secrecy is the enemy of democracy. Secrecy subverts, and will eventually destroy any representative system.

The enactment of this legislation in this Congress will make it far more difficult for the Federal bureaucrats to withhold vital information from the Congress and the public.

Senator KENNEDY. Thank you very much, Congressman.

As I mentioned at the outset, I think there isn't any Member of the Congress that spends as much time on this particular issue as yourself. And so we value very highly your comments. The procedures which you have outlined would appear to me to be extremely worthwhile and constructive and helpful.

I just have a few questions, and then I will yield to my colleagues.

There has been a great deal written recently about official leaks from the executive branch.

Do you consider this to be an appropriate mechanism for the dissemination of information?



Mr. MOORHEAD. No, Mr. Chairman, I do not. I think if you have a very closed and secret government and no proper mechanism for making vital information public, then maybe the leak is the only alternative. But I prefer a government of laws that opens up all possible government information to Congress and the public.

Senator KENNEDY. This I suppose ties into the problems which come from information that is withheld, obviously, or even eventually released, and the potential dangers that can come, I suppose, from either.

Did you find this during the course of your own hearings to be a troublesome question or problem that was of concern to your committee?

Mr. MOORHEAD. Most of the concern expressed during our hearings was about the various devices that departments and agencies used to keep their information hidden. One of the ways was foot-dragging delay. We know that most information is a very perishable commodity. If an agency can keep something out of the newspapers for 20 or 30 days, it may no longer be news, so they have won that battle. And that was the very technique used by many Federal agencies and is one of the main concerns of our subcommittee.

Senator KENNEDY. I think in your hearings it was brought out that there were 2,500 administrative sanctions against Government employees because of the violations of the classification requirements, all of them, as I understand, from under classification, is that correct?

Mr. MOORHEAD. That is correct. And not one case in 2,500 involved discipline for overclassification.

Senator KENNEDY. What should the Congress do on that issue to try and create some kind of balanced sanctions for the employees when they face information requests?

Mr. MOORHEAD. My own recommendation is very close to that of Senator Muskie, which is to say that all classified information should be downgraded at a very rapid rate, unless the agency classifying could justify the need for continued classification before a congressionally established classification review commission. The Government agency would have to convince this commission that a particular classified document was important enough so that it should still be kept secret; in effect, the Congress would thus have an instrumentality to review classification markings on an orderly basis.

Senator KENNEDY. Would this apply as well toward the disclosure of information within the appropriate agencies upon public request?

Mr. MOORHEAD. Yes. I would say, Mr. Chairman, that with this classification review agency created by law by Congress, if a newspaperman or a Government official thought that a particular classification was not necessary in the protection of our national security, but for other maybe less worthy purposes, he could come to the Commission, and if they agreed, it could be disclosed without fear of prosecution in any court in the land.

Senator KENNEDY. As you remember, Congressman, the Freedom of Information Act was really urged on the Congress by the members of the press. Why do you think that they have been as reluctant to use the act as I think it appeared they would in the earliest days?

Mr. MOORHEAD. That question has been a major concern of all of the members of our subcommittee. The press did advocate and support

the bill back in the 1960's. We did finally pass it in 1966. And yet I don't believe it has been adequately used by the press. We were given two major reasons: One, that the administrative proceedings under the act do take time; court proceedings are lengthy and costly. This is one of the reasons why in the bill we try to shorten these procedures, since news is so very perishable.

And second, I think that in many cases, a newsman hesitates to admit that he needs a law to obtain information. There is pride involved on the part of the investigative reporter. He uses sources in the bureaucracy of Government to get information. If he must bring a suit in court under the act to obtain that information, he is admitting that he may not have the sources that he should or used to have.

I would say finally that in recent years news reporters and papers are successfully using the act. Two cases last year involving the Department of Housing and Urban Development were won—the Philadelphia Inquirer brought a successful suit under the act, and also the Nashville Tennessean won a similar suit involving FHA audit reports. So that has been used. But I quite agree, Mr. Chairman, not adequately. If you can help get more newspaper people to use the act than I have, I commend you.

Senator KENNEDY. I suppose it is costly as well for them to take care of attorneys fees to carry it through.

Mr. MOORHEAD. That is true, cost of court actions are a major deterrent.

Senator KENNEDY. And I suppose the relationship between a newspaper reporter and the agency that he is covering has got to remain friendly if he is to do his job well; or if he does have some other means to continue any beneficial relationship which he might already have.

Mr. MOORHEAD. On the matter of costs, we do provide in the bill for authority of the court to award court costs, including a reasonable counsel fee to the plaintiff.

Senator KENNEDY. In the course of your hearings which agencies had the best record of making the information available to Congress and the public and which had the poorest?

Mr. MOORHEAD. I would start maybe with the poorest. The Department of Agriculture, the Food and Drug Administration, and the Internal Revenue Service were among the worst.

Senator KENNEDY. Are they sort of constant repeaters?

Mr. MOORHEAD. Yes, constant repeaters.

Senator KENNEDY. From the trend that you saw of these particular agencies over any given period of time, they were the most reluctant or recalcitrant?

Mr. MOORHEAD. I think those were the most reluctant and recalcitrant; there were others, too.

Senator KENNEDY. Did you also find that the agencies themselves in many instances were slow in implementing court decisions that affected the availability of information? And could you comment on that? Do you have any suggestions about what might be done on that?

Mr. MOORHEAD. Again, the Agriculture Department, even after losing the *Wellford* case, for example, was slow in producing the documents.

The Federal Trade Commission still refuses to release administrative manuals even after the decision of the courts in *Long v. the Inter-*



*nal Revenue Service* and *Hawks v. the Internal Revenue Service* decided that such manuals were not exempt from disclosure. The solution I think is constant oversight by the Congress—for us to continue to keep holding their feet to the fire, as it were. The proposal in the legislation to have annual reports by each of the agencies as to their implementation of the act is important. We can then see which ones are doing a good job and praise them, while isolating those who are subverting the law. We should then haul them up before the Congress to explain why they are so bad.

Senator KENNEDY. Since we have given you a chance to tell about the bad ones, do you have any good ones?

Mr. MOORHEAD. HEW and EPA were better than average. We recommended some administrative changes in our report last fall. There has been some progress. The Justice Department came up, I think, with the best revised regulations, not only good for the Justice Department but also for use as a model for other departments and agencies.

Senator KENNEDY. Are they available? Will you make those a part of the record?

Mr. MOORHEAD. I think they are the best, the model for regulations under the Freedom of Information Act. And we will make them available for the hearing record.

[The material referred to above follows:]

[Title 28—Judicial Administration]

CHAPTER I—DEPARTMENT OF JUSTICE

[Order No. 502-73]

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

SUBPART A—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552 (A)

This order revises the regulations of the Department of Justice which prescribe the procedures for making and acting upon requests from members of the public for access to Justice Department records under the Freedom of Information Act (5 U.S.C. 552).

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, 552, and 31 U.S.C. 483a, Subpart A of Part 16 of Chapter I of Title 28, Code of Federal Regulations, is revised, and its provisions renumbered, to read as follows:

See.

- 16.1 Purpose and scope.
- 16.2 Public reference facilities.
- 16.3 Requests for identifiable records and copies.
- 16.4 Requests referred to division primarily concerned.
- 16.5 Prompt response by responsible division.
- 16.6 Responses by division: Form and content.
- 16.7 Appeals to the Attorney General from initial denials.
- 16.8 Maintenance of files.
- 16.9 Fees for provision of records.
- 16.10 Exemptions.

AUTHORITY: 28 U.S.C. 509, 510; 5 U.S.C. 301, 552; 31 U.S.C. 483a.

§ 16.1 Purposes and scope.

(a) This subpart contains the regulations of the Department of Justice implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all divisions within the Department of Justice. Official records of the Department of Justice made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this subpart. Officers and employees

of the Department may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. Persons seeking information or records of the Department of Justice may find it useful to consult with the Department's Office of Public Information before invoking the formal procedures set out below. To the extent permitted by other laws, the Department also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

(b) The Attorney General's Memorandum on the Public Information section of the Administrative Procedure Act, which was published in June 1967 and is available from the Superintendent of Documents, may be consulted in considering questions arising under 5 U.S.C. 552. The Office of Legal Counsel after appropriate coordination is authorized from time to time to undertake training activities for Department personnel to maintain and improve the quality of administration under 5 U.S.C. 552.

#### § 16.2 Public reference facilities.

Each office listed below will maintain in a public reading room or public reading area, the materials relating to that office which are required by 5 U.S.C. 552(a)(2) and 552(a)(4) to be made available for public inspection and copying:

- U.S. Attorneys and U.S. Marshals—at the principal offices of the U.S. Attorneys listed in the U.S. Government Organization Manual;
- Bureau of Prisons and U.S. Board of Parole—at the principal office of each of those agencies at 101 Indiana Avenue NW., Washington, D.C. 20537;
- Community Relations Service—at 550 11th Street NW., Washington, D.C. 20530;
- Internal Security Division (for registrations of foreign agents and other pursuant to 26 CFR Parts 5, 10, 11, and 12)—at Room 458, Federal Triangle Building, 315 Ninth Street, NW., Washington, D.C. 20530;
- Board of Immigration Appeals—at Room 1138, 521 12th Street NW., Washington, D.C. 20530;
- Immigration and Naturalization Service—see 8 CFR § 103.9;
- Law Enforcement Assistance Administration, 683 Indiana Avenue NW., Washington, D.C. 20530, and Regional Office as listed in the U.S. Government Organization Manual;
- All other Offices, Divisions, and Bureaus of the Department of Justice—at Room 6620, Department of Justice, 10th Street and Pennsylvania Avenue NW., Washington, D.C. 20530.

Each of these public reference facilities will maintain and make available for public inspection and copying a current index of the materials available at that facility which are required to be indexed by 5 U.S.C. 552(a)(2).

#### § 16.3 Requests for identifiable records and copies.

(a) *Addressed to Office of Deputy Attorney General.*—A request for a record of the Department which is not customarily made available, which is not available in a public reference facility as described in § 16.2, and which is not a record maintained by the Immigration and Naturalization Service, the Bureau of Prisons, or the Board of Immigration Appeals shall be addressed to the Office of the Deputy Attorney General, Washington, D.C. 20530. Requests for records of the Bureau of Prisons or of the Board of Immigration Appeals shall be sent directly to the Director, Bureau of Prisons, 101 Indiana Avenue, NW., Washington, D.C. 20537, or the Chairman, Board of Immigration Appeals, Department of Justice, Washington, D.C. 20530, respectively. Requests for records of the Immigration and Naturalization Service, including aliens' record files temporarily in the possession of the Board of Immigration Appeals, shall be made and processed pursuant to the provisions of Part 103 of Title 3 of the Code of Federal Regulations.

(b) *Request should be in writing and for identifiable records.*—A request for access to records should be submitted in writing and should sufficiently identify the records requested to enable Department personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester. If the request relates to a matter in pending litigation, the court and its location should be identified.

(c) *Form may be requested.*—Where the information supplied by the requester is not sufficient to permit location of the records by Department personnel with



a reasonable amount of effort, the requester may be sent and asked to fill out and return a Form D.J. 118, which is designed to elicit the necessary information.

(d) *Categorical requests.*—(1) *Must meet identifiable records requirement.*—A request for all records falling within a reasonably specific category shall be regarded as conforming to the statutory requirement that records be identifiable if it can reasonably be determined which particular records come within the requests, and the records can be searched for, collected, and produced without unduly burdening or interfering with Department operations because of the staff time consumed or the resulting disruption of files.

(2) *Assistance in reformulating non-conforming requests.*—If it is determined that a categorical request would unduly burden or interfere with the operations of the Department under paragraph (d) (1) of this section, the response denying the request on those grounds shall specify the reasons why and the extent to which compliance would burden or interfere with Department operations, and shall extend to the requester an opportunity to confer with knowledgeable Department personnel in an attempt to reduce the request to manageable proportions by reformulation and by agreeing on an orderly procedure for the production of the records.

(e) *Requests for records of other agencies.*—Many of the records in the files of the Department are obtained from other agencies for litigation or other purposes. Where it is determined that the question of the availability of requested records is primarily the responsibility of another agency, the request will be referred to the other agency for processing in accordance with its regulations, and the person submitting the request will be so notified.

#### § 16.4 Requests referred to division primarily concerned.

(a) *Referral to responsible division.*—The Deputy Attorney General shall, promptly upon receipt of a request for Department records, ascertain which division of the Department has primary concern with the records requested. As used in this subpart, the term "division" includes all divisions, bureaus, offices, services, administrations, and boards of the Department, the Pardon Attorney and Federal Prison Industries except as otherwise expressly provided. He shall then promptly forward the request to the responsible division and notify the requester of his action. The Deputy Attorney General shall maintain or be furnished with a file copy of each request received, and records to show the date of its receipt from the requester, the division to which it was forwarded, and the date on which it was forwarded. For all purposes under this subpart the Board of Immigration Appeals and the Bureau of Prisons shall be considered the responsible division with respect to requests sent directly to them pursuant to § 16.3 hereof.

(b) *Deputy Attorney General shall assure timely response.*—The office of the Deputy Attorney General shall periodically review the practices of the divisions in meeting the time requirements set out in § 16.5 hereof, and take such action to promote timely responses as it deems appropriate.

#### § 16.5 Prompt response by responsible division.

(a) *Response within 10 days.*—The head of the responsible division shall, within 10 working days of its receipt by the division and more rapidly if practicable, either comply with or deny a request for records unless additional time is required for one of the following reasons:

(1) The requested records are stored in whole or in part at other locations than the office in receipt of the request;

(2) The request requires the collection of a substantial number of specified records;

(3) The request is couched in categorical terms and requires an extensive search for the records responsive to it;

(4) The requested records have not been located in the course of a routine search and additional efforts are being made to locate them;

(5) The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are (i) exempt from disclosure under the Freedom of Information Act, and (ii) should be withheld as a matter of sound policy, or disclosed only with appropriate deletions;

(6) The requested records of some of them involve the responsibility of another agency or another division of the Department whose assistance or views are being sought in processing the request.

When additional time is required for one of the above reasons, the head of the responsible division shall acknowledge receipt of the request within the 10-day period and include a brief notation of the reason for the delay and an indication of the date on which it is expected that a determination as to disclosure will be forthcoming. A copy of each such acknowledgment shall be furnished to the Deputy Attorney General. An extended deadline adopted for one of the reasons set forth above will be considered reasonable in all cases if it does not exceed 10 additional working days. The head of the responsible division may adopt an extended deadline in excess of the 10 additional working days (i.e., a deadline in excess of 20 working days from the time of receipt) upon specific prior approval of the notice to the requester of the extension by the office of the Deputy Attorney General where special circumstances reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

(b) *Petition if response not forthcoming.*—If the head of the responsible division does not respond to or acknowledge a request within the 10-day period, if the head of the responsible division does not act on a request within an extended deadline adopted for one of the reasons set forth in paragraph (a) of this section, or if the requester believes that an extended deadline adopted pursuant to paragraph (a) of this section is unreasonable, the requester may petition the Deputy Attorney General to take appropriate measures to assure prompt action on the request. In order for a requester to treat a failure to respond by the head of a division as a denial and file an appeal, he must have filed a petition with the Deputy Attorney General complaining of delay under this subsection.

(c) *Action on petitions complaining of delay.*—(1) *Prompt action.*—Where a petition to the Deputy Attorney General complaining of a division's failure to respond to a request or to meet an extended deadline does not elicit a response to the request from the head of the responsible division within 10 days, or where a petition complaining of a division's adoption of an unreasonable deadline fails to elicit an acknowledgement of the petition within 10 days and a response to the request from the head of the division within a reasonable time, the requester may treat the request as denied, and he may then file an appeal to the Attorney General.

(2) *Copies maintained by Deputy Attorney General.*—Copies of all petitions complaining of delay, and records of all actions taken upon them shall be supplied to or maintained by the Deputy Attorney General.

(d) *Removal by Deputy Attorney General.*—The Deputy Attorney General may remove any request or class of requests from the division to which it is referable under these regulations and, in such event, shall perform the functions of the head of such division with respect thereto.

#### § 16.6 Responses by divisions: form and content.

(a) *Form of grant.*—When a requested record has been identified and is available, the responsible division shall notify the requester as to where and when the record is available for inspection or copies will be available. The notification shall also advise the requester of any applicable fees under § 16.9 hereof.

(b) *Form of denial.*—A reply denying a written request for a record shall be in writing signed by the head of the responsible division and shall include:

(1) *Exemption category.*—A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, to the extent consistent with the purpose of the exemption a brief explanation of how the exemption applies to the record withheld, and, if the head of the division considers it appropriate, a statement of why the exempt record is being withheld; and

(2) *Administrative appeal and judicial review.*—A statement that the denial may be appealed within 30 days to the Attorney General, and that judicial review will be thereafter available either in the district in which the requester resides or has a principal place of business or in which the agency records are situated.

(c) *Record cannot be located or does not exist.*—If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(d) *Copy of responses to Deputy Attorney General.*—A copy of each grant or denial letter, and each notification under paragraph (c) of this section shall be furnished to the Deputy Attorney General.

#### § 16.7 Appeals to the Attorney General from initial denials.

(a) *Appeal to Attorney General.*—When the head of a division has denied a request for records in whole or in part, the requester may, within 30 days of its



receipt, appeal the denial to the Attorney General, Washington, D.C. 20530. The appeal shall be in writing.

(b) *Action within 20 working days.*—The Attorney General will act upon the appeal within 20 working days of its receipt, and more rapidly if practicable, unless novel and difficult questions are involved. Where such questions are involved, the Attorney General may extend the time for final action for a reasonable period beyond 20 working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response may be expected.

(c) *Form of action on appeal.*—The Attorney General's action on an appeal shall be in writing. A denial in whole or in part of a request on appeal shall set forth the exemption relied on, a brief explanation consistent with the purpose of the exemption of how the exemption applies to the record withheld and the reasons for asserting it.

(d) *Copies to Deputy Attorney General.*—Copies of all appeals and copies of all actions on appeals shall be furnished to the Deputy Attorney General.

#### § 16.8 Maintenance of files.

(a) *Complete files maintained by Deputy Attorney General.*—The Deputy Attorney shall maintain files containing all material required to be retained by or furnished to him under this subpart. The material shall be filed by individual request; and shall be indexed according to the exemptions asserted; and, to the extent feasible, according to the type of records requested.

(b) *Maintenance of file open to public.*—The Deputy Attorney General shall also maintain a file, open to the public, which shall contain copies of all grants or denials of appeals by the Attorney General. The material shall be indexed by the exemption asserted, and, to the extent feasible, according to the type of records requested.

(c) *Protection of privacy.*—Where the identity of a requester, or other identifying details related to a request, would constitute an invasion of personal privacy if made generally available, the Deputy Attorney General shall delete identifying details from the copies of documents maintained in the public file established under paragraph (b) of this section.

#### § 16.9 Fees for provision of records.

(a) *When charged.*—User fees pursuant to 31 U.S.C. 483a (1970), shall be charged according to the schedule contained in paragraph (b) of this section for services rendered in responding to requests for Department records under this subpart unless the responding official of the Department determines in conformity with the provisions of 31 U.S.C. 483a, that such charges or a portion thereof are not in the public interest. Such a determination shall ordinarily not be made unless the service to be performed will be of benefit primarily to the public as opposed to the requester, or unless the requester is an indigent individual. Fees shall not be charged where they would amount, in the aggregate, for a request or series of related requests, to less than \$3. Ordinarily, fees shall not be charged if the records requested are not found, or if all of the records located are withheld as exempt. However, if the time expended in processing the request is substantial, and if the requester has been notified of the estimated cost pursuant to paragraph (c) of this section and has been specifically advised that it cannot be determined in advance whether any records will be made available, fees may be charged.

(b) *Services charged for, and amount charged.*—For the services listed below expended in locating or making available records or copies thereof, the following charges shall be assessed:

(1) *Copies.*—For copies of documents (maximum of 10 copies will be supplied) \$.10 per copy of each page.

(2) *Clerical searches.*—For each one quarter hour spent by clerical personnel in excess of the first quarter hour in searching for and producing a requested record, \$1.25.

(3) *Monitoring inspection.*—For each one quarter hour spent in monitoring the requester's inspection of records, \$1.25.

(4) *Certification.*—For certification of true copies, each, \$1.

(5) *Attestation.*—For attestation under the seal of the Department, \$3.

(6) *Nonroutine, nonclerical searches.*—Where a search cannot be performed by clerical personnel, for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel, and where the amount of time that must be expended in the search and collection of the requested records by such higher level personnel is substantial, charges for the search may be made at a rate in excess of the clerical

rate, namely for each one quarter hour spent in excess of the first quarter hour by such higher level personnel in searching for a requested record, \$3.57.

(7) *Examination and related tasks in screening records.*—No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall ordinarily be made for the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy. However, where a broad request requires Department personnel to devote a substantial amount of time to examining records for the purpose of screening out certain records or portions thereof in accordance with determinations that material of such a nature is exempt and should be withheld as a matter of sound policy, a fee may be assessed for the time consumed in such examination. Where such examination can be performed by clerical personnel, time will be charged for at the rate of \$1.25 per quarter hour, and where higher level personnel are required, time will be charged for at the rate of \$3.75 per quarter hour.

(8) *Computerized Records.*—Fees for services in processing requests maintained in whole or part in computerized form shall be in accordance with this section so far as practicable. Services of personnel in the nature of a search shall be charged for at rates prescribed in paragraph (b) (6) of this section unless the level of personnel involved permits rates in accordance with paragraph (b) (2) of this section. A charge shall be made for the computer time involved, based upon the prevailing level of costs to governmental organizations and upon the particular types of computer and associated equipments and the amounts of time on such equipments that are utilized. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon prevailing levels of costs to governmental organizations and upon the type and amount of such supplies or materials that is used. Nothing in this paragraph shall be construed to entitle any person, as of right, to any services in connection with computerized records, other than services to which such person may be entitled under 5 U.S.C. 552 and under the provisions, not including this paragraph (b), of this subpart.

(c) *Notice of anticipated fees in excess of \$25.*—Where it is anticipated that the fees chargeable under this section will amount to more than \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In appropriate cases an advance deposit may be required. The notice or request for an advance deposit shall extend an offer to the requester to confer with knowledgeable Department personnel in an attempt to reformulate the request in a manner which will reduce the fees and meet the needs of the requester. Dispatch of such a notice or request shall toll the running of the period for response by the Department until a reply is received from the requester.

(d) *Form of payment.*—Payment should be made by check or money order payable to the Treasury of the United States.

#### § 16.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in subsection (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory files; internal procedures and communications; materials exempted from disclosure by other statutes; information given in confidence; and matters involving personal privacy. The scope of the exemptions is discussed generally in the Attorney General's memorandum referred to in § 16.1.

(b) The Attorney General will not withhold any records of the Department over 10 years old on the ground that they are classified pursuant to Executive Order No. 11652 or its predecessors without notification from the Department review committee established in accordance with the Executive order and Subpart G of Part 17 of this chapter, by its Chairman, that continued classification is required by the Executive order.

*Previous regulations superseded.*—This order supersedes order No. 381-67 of July 5, 1967, as amended, 28 CFR Part 16, Subpart A (1972), effective March 1, 1973.

Dated: February 9, 1973.

RICHARD KLEINDIENST, *Attorney General.*

[FR Doc. 73-2970 Filed 2-13-73; 8:45 am]



Senator KENNEDY. Senator Muskie.

Senator MUSKIE. Congressman Moorhead, I would like to pay my tribute to the work you have done on the House side. And I think your leadership extends beyond the House, with all respect to that body. It has been my privilege to introduce on the Senate side S. 1142, which is the Senate version of the bill which you basically developed. And we now have 20 cosponsors, an excellent example, I think, of comity between the Houses, and of what we are trying to develop between the executive branch and the Congress with little success.

In connection with the freedom of information legislation and the amendments, although I am not going to pursue the details of that, which you have discussed with Senator Kennedy, I wondered what merit you may see in the idea of strengthening the public's right to government information by the statutory creation of one top official in every agency to administer the Freedom of Information Act in that agency?

Now, the legislation has already had the effect of setting up such positions in some agencies, but not in all. And it may be that unless there is some such person in every agency, that the responsibility for implementing the act becomes lost.

Mr. MOORHEAD. Senator, I think that is an excellent suggestion. I have been working on a draft bill to do just that. It will be introduced soon. I think we should, either by law or otherwise, require that one person—the agency's public information officer—have full responsibility and sufficient rank to expedite the free flow of information. Rather, it seems to me that under the present system, the legal office of an agency—and I am a lawyer by trade—believes that his job is to find every way possible under the law to keep his agency from being forced to reveal information to the public. So that I believe this is an excellent suggestion. The responsible public information official should be a fairly high rank, such as an assistant secretary in a department, so that both the Congress and the press can know exactly to whom to go when they have a freedom of information matter to discuss.

Senator MUSKIE. Senator Kennedy raised the question of whether and if not, why not, newspapers have been undertaking to use the Freedom of Information Act. And he gave some reasons. Isn't another reason the imposition of unconscionable charges for research to get information?

Mr. Bancroft, vice president of the New York Times, yesterday gave us testimony outlining the Times' experience under this legislation. And the Times was inhibited by the costs that were involved. They have considerably more resources than other newspapers. Have you found that to be a problem?

Mr. MOORHEAD. Yes, Senator, we have. We have recommended that uniform fees be established. Fees charged the public for merely photostating requested records in the agencies ranges from 5 cents a copy to \$1 or more. That does not include search fees, which are more expensive. I remember a case involving the Department of Agriculture, where the search fee in one case was estimated at about \$91,000.

Senator MUSKIE. Isn't it your view that there should first be an announced schedule of fees?

Mr. MOORHEAD. And as reasonable as possible.

Senator MUSKIE. And secondly, that those fees ought not to be burdensome. The purpose of the fees is not to recover the cost of labor and overhead and the rest of it, but merely, I suppose, to discipline in some way the requests for information without prohibiting them. I am not sure that we ought to charge fees at all, as a matter of fact. But in any case they ought to be reasonable and not so prohibitive as to deny, in effect, the advantages of the legislation.

Mr. MOORHEAD. I quite agree, sir. Frivolous requests for information are often discouraged by charging at least some minimal fee.

Senator MUSKIE. One other question I would like to put. Yesterday Congressman Anderson made the point with respect to Attorney General Kleindienst's testimony the day before, that the effect of Mr. Kleindienst's policies, his administrative policies with respect to executive privilege, is to be more restrictive of Congress right to know what is going on in the executive branch than the law is on the public's right to know under the Freedom of Information Act. And I wonder if you would appreciate an opportunity to comment on that?

Mr. MOORHEAD. Yes, Senator. I think that the public has a right to know. I think the Congress has a right to know. But in addition, the Congress has a need to know, because we must have access to all information from the Executive if we are to carry out our constitutional functions of legislating and investigating. We have a need to know which should be greater than that of the public, because we have an obligation under the Constitution.

Senator MUSKIE. But Mr. Kleindienst appears to have restricted our right to a greater extent than that of the public under the Freedom of Information Act.

Mr. MOORHEAD. I completely disagree with the Attorney General, as I indicated earlier in my statement. I mentioned this House report of 1860, which referred to the House of Representatives as the "grand inquest of the Nation." I think that the Congress does have that function, which means that we can inquire into anything in government, and inquire from anybody in government. We do have the constitutional power, after all, in the House of impeaching, and the Senate of trying the President and the Vice President for high crimes, misdemeanors, and treason.

Senator MUSKIE. I would like to make one point a matter of record.

Mr. Kleindienst's testimony the other day was so extreme and it represented such an unprecedented expansion of the notion of executive privilege, that I had some mental reservations as to whether or not the position he was stating represented the position of this administration. And yesterday I expressed those reservations and I suggested that maybe he was flying by the seat of his pants. The press, the news stories this morning, indicate that Mr. Ziegler, when asked yesterday whether Mr. Kleindienst was speaking in fact for the administration, said that he was, completely, and that the position defined by Mr. Kleindienst before these subcommittees on Tuesday, represented the administration position. And if in fact it did, I would agree with Congressman Anderson yesterday that he has thrown down the gauntlet to Congress in a way that we cannot ignore it, because I don't think we can let that position stand as established doctrine in our system of government.



Mr. MOORHEAD. I agree with you wholeheartedly, Senator.

Senator KENNEDY. Senator Ervin.

Senator ERVIN. Congressman, I want to tell you that I have watched your work in this field of government for a long time, and with much enthusiasm.

I know of no person who has made a greater contribution to maintaining the powers of Congress and the right of the Congress to be informed as to what is going on so that it can legislate wisely, than you have.

Mr. MOORHEAD. I know of one, Senator, and that is you, sir.

Senator ERVIN. Thank you.

I would like to make an offer to you. The Subcommittee on Separation of Powers has been conducting a survey of the instances in which the executive branch of the Government has declined to give information to a congressional committee or to the Comptroller General. This survey is not yet complete, because every day we get further information about the refusal of information. But thus far we have obtained information from various Senate and House committees and from the Office of the Comptroller General, of 166 instances since January 1, 1964, in which the executive branch of the Government refused to give information requested either by a congressional committee or by the Comptroller General.

I would like to give you a copy of that survey, because you have done considerable work in this field.

I have no further questions, but I would suggest to the chairman that the two consultants of the Subcommittee on Separation of Powers who did so much in conducting the investigations previously held by that subcommittee, and who made valuable suggestions about legislation in this field, Professor Bickel of Yale Law School and Prof. Arthur Miller of the George Washington University Law School, be permitted to ask the witness any questions that have occurred to them.

Senator KENNEDY. Professor Miller?

Mr. MILLER. Thank you, Senator.

I just have one, Mr. Moorhead, if I might.

May I expand a bit on what I think Senator Muskie was asking you a moment ago, and ask the question I asked Mr. Bancroft of the New York Times yesterday. I was concerned with the amount of money it costs for an individual, a person, a scholar, a small newspaper, a small radio station, to get information from government. It seems to me that Mr. Bancroft's answer was that it would cost considerable money, and it took a lot of resources. So the answer is that even if the information were available, to pursue it by litigation is highly improbable if not impossible. And then it seems to me the question comes as to whether or not Congress should consider the establishment of an office, perhaps in the nature of an ombudsman type of office, which would investigate all requests for information from the executive branch, or from any other branch of Government for that matter, and screen out those which are frivolous, and give the reply to the citizen or to whoever it is that it wishes.

Would you like to comment on that, sir? It seems to me that the time has come for Congress to establish an office, sort of a lawyer-for-the-people type of thing, to permit them to contest these actions of keeping information from the people.

Mr. MOORHEAD. I hadn't thought of this until you just brought it up, Mr. Miller, but at first blush, this sounds like a very reasonable compromise between making all information available freely without charge—which could result in vast numbers of frivolous requests—and the present system where the agency itself sets the fees and can almost rule out effectively that information it does not want to provide the public.

On the question of the cost of FOI litigation, it is your suggestion that the ombudsman would serve as the lawyer for the person requesting the information in a court, or would you still have——

Mr. MILLER. I am not prepared really to go that far. But the only question is, if the investigator perceived that the information was withheld, he could report back and make public his finding. It seems to me that the publicity would be such that very often it would help to reduce the workload greatly.

If you want a lawyer, it seems to me that you can follow up on what the Senate put in its version of the impoundment bill. The impoundment bill has the Comptroller General authorized to bring suit in the name of Congress when there is Presidential impoundment of funds, and the U.S. district court in Washington is empowered to hear those cases. Something similar to that might be considered. I am merely broaching an idea without going into the details.

Mr. MOORHEAD. I think this idea is excellent and should be explored. We might take just as the first step in the beginning not to have the ombudsman authorized to go to court, but to merely make a ruling which we would expect the departments and agencies to follow.

Mr. MILLER. The first step, it seems, would be a very desirable one. It would cost very little money, and it would solve a lot of the administration's problems, the public administrators' problems, as well as solve a lot of the citizens' problems, and rule out many of these frivolous cases, to take care of the costs of litigating a lot of matters which otherwise should not be litigated.

Mr. MOORHEAD. I should think that an agency or department would welcome this suggestion because it would take some of the responsibility off their shoulders.

Mr. MILLER. I am not quite sure that they would. But that is all.

Mr. MOORHEAD. I said maybe they should welcome it.

Senator KENNEDY. Professor Bickel?

Mr. BICKEL. No questions.

Senator ERVIN. If you will permit me to do a little proselytizing on behalf of the impoundment bill that passed the Senate the other day as amendment to the dollar devaluation bill, by a vote of 70 to 24. The House has a bill introduced by a highly respected Member of the House, Congressman Mahon. He has an approach that I took in March 1970, when I introduced the bill in the Senate. After studying that approach and conducting hearings, I came to the conclusion that that approach was a rather futile one, because the difference fundamentally between it and the Senate-passed bill, which was in harmony with the bill reported by the Senate Government Operations Committee, is that where the President impounds funds under the Mahon bill, the impoundment is valid unless Congress by a concurrent resolution vetoes the impoundment. The Senate bill, on the contrary, provides



that the impoundment shall cease after 60 days if within that time both Houses of Congress do not pass a resolution ratifying the impoundment.

Now, there are some loose expressions in the textbooks to the effect that a concurrent resolution does not have to be sent to the President. I made a study of this subject, and I found that the current impression is very often misleading. If a concurrent resolution is one that is merely for the housekeeping affairs of the Congress, such as establishing a joint committee, or a matter of that kind, and has no legislative effect, it does not have to be sent to the President. But if any resolution requiring the concurrence of both Houses has any legislative effect whatever, it has to be sent to the President and is subject to the President's veto. So under the Senate amendment, the Constitution may require that Congress vote four times before it spends a single penny for appropriated funds.

First, it has to pass an authorization bill by a majority vote of both Houses of Congress. The President can veto that. And then both Houses of Congress would have to override the veto by a two-thirds majority in each House. So that is twice the Congress has expressed its opinion on it.

Then Congress has to pass the appropriations bill carrying out the terms of the authorization bill by a majority vote of both Houses. And then the President can veto that. And Congress would have to pass the appropriations bill then over the President's veto by a two-thirds vote of both Houses.

Now, under the Senate amendment, that would be the end of the peapicking for the President, unless the President could get an affirmative resolution ratifying his impoundment. Under the Mahon bill, the President can impound and Congress has to pass what the bill calls a concurrent resolution, by a majority vote, before Congress can veto the impoundment. If it passes such a resolution, the resolution has legislative effect, because it would invalidate the impoundment, and therefore it must be sent to the President. It is then subject to a Presidential veto. So for the sixth time, under the Mahon bill, Congress would have to vote by either a majority vote or a two-thirds vote of both Houses to make the appropriation effective.

Thus, the Mahon approach would require Congress to vote twice more before it could make the expenditure of a single penny effective. In addition, it puts it in the power of one-third plus one of the membership of either Houses of Congress to nullify the congressional will, which has already been expressed five times either by a majority vote or by a two-thirds majority. I don't think the Congress ought to permit the Executive to make such a monkey of it with that procedure, with all due respect to everybody.

So I hope the House will adopt the bill passed by the Senate as an amendment to the Par Value Modification Act, or as an independent bill.

MR. MOORHEAD, Senator, I also have great respect for Congressman Mahon, but I think your analysis of the situation in this instance is sound and should be adopted by the House. And I assure you that I will do my best to see that that approach is taken.

Senator ERVIN. Thank you.

I think if we get this bill passed substantially as it passed the Senate, for the first time in the history of the Nation we will have an effective way to enforce the power that the Constitution clearly declares that the Congress rather than the President should have.

Will the members of the committee forgive me for proselytizing?

Senator MUSKIE. It is a worthy cause.

Senator KENNEDY. Congressman, just finally, I outlined in a preliminary way a process by which the issue between the Congress and the Executive could be framed for consideration in a court of law.

I am interested in your own feeling about the withholding of information from congressional committees—whether you think that the Congress itself should hold up appropriations or hold up nominees if the administration withholds information from the Congress? Have you formed any opinion about this?

Mr. MOORHEAD. Mr. Chairman, I believe that we have to resort to strong action like that. The only reservation I have about your recommendation of court action is that I think it concedes too much on the part of the Congress. We have a constitutional right to all information, all witnesses, and that we shouldn't have to resort to a court test. Professor Berger of Harvard, who I understand will be a witness here later this morning, agrees with that position, I believe.

To demonstrate our determination in this confrontation we may have to do some things that we wouldn't ordinarily like to do, such as to withhold appropriations or to pass a bill that says, in effect, "No person can receive a salary under this appropriation if he declines to appear before a duly constituted congressional committee."

Senator KENNEDY. The point of my suggestion was recognition that if the Executive is willing to discuss the issue and work things out with the Congress in a reasonable and rational way, then obviously you are going to get the confrontation which we have at the present time. But the suggestion which I made earlier was to permit a court to be an arbiter in this situation, not taking or giving anything away on either side on the issue, but as a means and process of resolving.

Mr. MOORHEAD. When we do have contests between two branches of Government—the executive and the legislative—the judicial branch has to referee the match.

Senator KENNEDY. Thank you very much, Congressman. We appreciate it very much.

Mr. MOORHEAD. Thank you very much. And congratulations for the work you are all doing in this vital area. It is tremendously important.

Senator KENNEDY. We are pleased to have as our next witness Mr. Ralph Nader, who has been a strong and consistent advocate in Washington for openness in Government. Mr. Nader has written and spoken extensively on problems arising under the Freedom of Information Act, and he and his associates have been responsible for more lawsuits under the act than anyone else.

We are glad you could be with us this morning to give us the benefit of your perspectives on the legislation and issues before us.



STATEMENT OF RALPH NADER, ACCOMPANIED BY RONALD  
PLESSER

Mr. NADER. Thank you, Mr. Chairman.

Distinguished members of the Subcommittees on the Separation of Powers, Intergovernmental Relations, and Administrative Practice and Procedure, thank you for your invitation to present my views on the enforcement of the Freedom of Information Act and to comment upon S. 1142 which would amend that act. Mr. Ronald Plessler, a lawyer working in the freedom of information area, is accompanying me today.

When President Johnson signed this legislation on July 4, 1966, he stated, "The United States is an open society in which the people's right to know is cherished and guarded." However, the experience of the past 6 years has shown that this "cherished" right of the American public is not well guarded by the Freedom of Information Act or by the Government administrators who are entrusted with the duty to protect the public's right to know. On many occasions my associates and I have had experiences which indicate that the act that we are discussing today has not guaranteed public access and has not accomplished Congress' intention to open Government to public scrutiny.

Before discussing our experience under the act and our specific comments on the proposed legislation, I want to describe the basic scope of the Freedom of Information Act. The act applies only to executive branch agencies and departments and excludes the Congress. The Library of Congress and the General Accounting Office and the Cost Accounting Standards Board, all "agencies" of Congress, consider themselves exempted from the act. The GAO, as well as various committees of Congress, undertake substantive investigations in which facts are gathered and information obtained. If we are to have openness in Government, then all Government should be open to public access. The GAO and the Congress function in much the same way as some agencies do, but unlike such agencies the GAO and some of the activities of the committees are closed to public scrutiny. Congress serves an important role in Government and the law which guarantees public access to Government should not exclude Congress.

I realize this is a sensitive point. But there are sufficient cases where in the past the Freedom of Information Act might well advance the cause of democracy and justice if it applied to the Congress.

Just recently the Subcommittee on Executive Reorganization had its staff investigate an auto defects situation, where the final conclusions were released, and the basic technical documents and depositions and all other materials on which it was based were withheld from the public.

Senator KENNEDY. Do you think it ought to apply to the judiciary, too?

Mr. NADER. I certainly think it should apply to the Judicial Conference and the kind of deliberations that go to modify the rules under which the judiciary operates. I certainly would go that far.

I think also in the past, where there have been congressional committee violations of, one might say, other people's civil rights, it would have been very salutary to require the kind of information on which these accusations were made with such liberality.

And to take a personal example, in the course of our study of Congress, we have requested that each Member of Congress put the Congress project on congressional mailing lists for press releases and newsletters. Less than half of the Members have done so, and many refuse to give us access to this material.

I realize that they can't put everybody on their mailing list, because of the possible burden here, and one might even concede to their particular priorities in this case. But I don't think it extends to prohibiting access to this material. One Member, for example, in the House refused, on the ground that he disagreed with our views, to send us his newsletters. And since there is no central file of newsletters and releases, the Library of Congress doesn't have any—we have not been able to obtain this otherwise public material. If the Members of Congress can restrict access to information which is otherwise public, there should be perhaps a requirement that a Member make at least such information accessible, he doesn't have to copy it for the person requesting it, just make it accessible.

The Library of Congress I think has been too protective of the Congress—perhaps understandably from a political point of view. For example, if scholars wanted to study the kind of output that comes from each congressional office, newsletters, statements, over a period of time, it would be very difficult for the scholars to do so, they certainly could not go to the Library of Congress and obtain this information.

Senator MUSKIE. I must say, Mr. Nader, I find more often than not that my problem is to get people to read information. I would appreciate cooperation.

Mr. NADER. But as you will recognize, Senator Muskie, there is a great diversity in Congress.

Senator MUSKIE. I understand.

Mr. NADER. The Freedom of Information Act was passed to guarantee the public's right to know how the Government is protecting the public interest. The public certainly has an equal if not a greater right in relation to Congress to know how its elected officials are performing their jobs in order that they can make more intelligent decisions at election time and influence them between election time. I think in Congressman Moorhead's point just recently the phrase should be not just a right to know, but also, giving it a greater gravity than that, information is the currency of democracy, as the saying goes. And I wouldn't want to characterize this purely as sort of like a privilege, or just simply a right.

I think it should be given a greater gravity than perhaps those words connote.



Our experience with the Freedom of Information Act—and we probably hold the country's record in being denied information by Federal agencies has been one of frustration and delay.

Where the act has worked, it has only been the result of intensive and constant effort. We have for the past several years sought access to various types of information through the Freedom of Information Act, and with your permission, we will submit some examples of that as of 1970, listing the various agencies and the kinds of information that we were denied.

Mr. Plessner now spends 100 percent of his time on access to Government information and on litigating cases under the Freedom of Information Act. He has the unfortunate distinction of being the only attorney in the United States who works full time on the act. We have 25,000 people in the country clipping newspapers for a living.

We have also established a press information center in conjunction with the National Press Club to provide assistance to members of the press in their problems of obtaining information from the Government. Even with as much effort as we have put into the act, to a large extent it has only been marginally effective for our questions. The problem is an overwhelming bureaucratic reluctance to comply with the act and the lack of any leadership by either the Department of Justice or the Office of Management and Budget in administering it. This is coupled with the fundamental failure of the act to hold bureaucrats personally responsible for their failure to comply with the requirements of law.

There is no sanction for failure to comply with that law. The only ultimate sanction is an open court order to produce the material.

The Justice Department and OMB have done almost nothing to insure uniform compliance with the act. One of the major problems of citizen access to information has been the cost of access. The Department of Agriculture requested the prepayment of \$85,000 in one instance and \$91,840 in another for access to documents.

Senator MUSKIE. May I ask a question at that point?

Mr. NADER. Yes.

Senator MUSKIE. When they set those figures, did they guarantee access, or was that simply prepaying for the search? Mr. Bancroft made the point yesterday that the New York Times was asked to assume certain costs with no guarantee that, when the search had been made, they would get the documents.

Mr. NADER. That is a very important point. Mr. Plessner will elaborate in a moment. But just the sheer obstacle of saying that it is going to cost that much time to search indicates that they have not developed an information policy that makes this information accessible. The comingling, or the lack of adequate indexing, are often conscious attempts to obfuscate and to prevent access.

Mr. PLESSNER. In these two cases I think the information sought was a set body of information, and the payment of those two figures would

have resulted in disclosure. There have been instances, especially one with FDA, where we were requested to make a prepayment for \$20,000 just for preliminary search, but we don't know what is going to result. So both problems certainly exist.

Senator MUSKIE. So it is conceivable that you can make the payment and still not get the information.

Mr. PLESSER. Absolutely, Senator.

Mr. NADER. These and other instances were too much even for the OMB, and in one of their few directives under the Freedom of Information Act, then Director of OMB, George Shultz directed on May 2, 1972, that the fees "should not be established at an excessive level for the purpose of deterring requests for copies of records." He stated that fees should not exceed the actual costs of the services provided and that all agencies report back to him no later than July 1 of that year.

Months passed and in January of 1973 OMB reported to the House Subcommittee on Foreign Operations and Government Information that it would not enforce this earlier directive and would permit agencies to charge what they wanted. OMB had taken a lone forward step but then fell back and has allowed agencies to maintain policies which even OMB admits deter access. A copy of Mr. Shultz' memorandum of May 2, 1972, is presented for inclusion in the record. The agencies have fee rates that range from 5 cents a page for copying charged by BEOC to \$1 a page for certain documents in possession of IRS. I submit for the record a table of fees prepared by Mr. Plessner which reflect the various fees charged by Federal agencies as of March 1, 1973.

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
*Washington, D.C., May 2, 1972.*

Re: Memorandum for the heads of executive departments and agencies.

A recent review of the reports submitted in response to OMB Circular No. A-25, "User Charges," and of fee schedules published in the Federal Register indicates that there are substantial variations in agency user charge policies for reproduction, search and certification of records. For example, charges for search vary from \$3 to \$5 per hour, certification charges range from \$.50 to \$5.00, and copying charges are set from \$.07 to \$1.00 per page. Some of the charges appear to be excessive, particularly where a large volume of requests is processed and where more than one copy of the same document is provided.

In establishing charges for these services, it is important that each agency and establishment of the executive branch assure that on the average, its fees are consistent with the requirement of OMB Circular No. A-25 and do not exceed the actual costs of the services provided. Fees should not be established at an excessive level for the purpose of deterring request for copies of records.

I am asking that you promptly assign a policy official to review your agency's charges for search, reproduction, and certification of records to determine whether some reductions of current charges could be made while continuing to cover the costs of providing the service.

You are requested to report to me, not later than July 1, the action taken in response to this memorandum.

GEORGE P. SHULTZ, *Director.*



TABLE OF AGENCY FEES AS OF MAR. 1, 1973, PREPARED BY RONALD PLESSER AND WILLIAM MURRAY

Agency	Minimum charge	Photocopy per page	Search
Agriculture <sup>1</sup> .....	\$4 (search).....	\$0.10, \$0.05 each additional page.	\$1 per ¼ hour.
Commerce.....	None (\$2.50) <sup>2</sup> .....	\$0.10 (\$0.25) <sup>2</sup> .....	\$5 per hour.
Defense.....	\$2.....	\$0.05.....	Do.
Health, Education, and Welfare (HEW) <sup>2</sup> .....	Fees assessed by separate operating agencies.		
Food and Drug Administration (FDA) <sup>3</sup> .....	\$1.....	\$0.25.....	\$3 per hour.
Social Security Administration (SSA).....	None.....	\$0.25.....	None specified.
Housing and Urban Development (HUD).....	None.....	\$0.25 (none, if under \$1)....	\$5 per hour, 1st hour at no charge.
Interior.....	Fees assessed by separate operating agencies.		
Justice.....	None.....	\$0.10.....	\$1.25 per ¼ hour, 1st ¼ hour at no charge.
Labor.....	None.....	\$0.20 (\$0.10) <sup>4</sup> .....	\$1 per ¼ hour, 1st ¼ hour at no charge.
State.....	\$3.50.....	\$0.40.....	\$3.50 per hour.
Transportation.....	\$1.....	\$0.25.....	\$3 per hour (or actual cost if more).
Treasury.....	\$2.....	\$0.10.....	\$3.50 per hour.
Internal Revenue Service (IRS).....	\$1.....	\$0.25; \$1 for form 440 (foundations' report form).	Do.
Atomic Energy Commission (AEC) <sup>3</sup> .....	\$1, \$2.50 (search).....	\$0.10, (\$0.25) <sup>2</sup> .....	\$5 per hour.
Civil Aeronautics Board (CAB).....	\$1.....	\$0.35, (\$0.15) <sup>4</sup> .....	None specified.
Equal Employment Opportunity Commission.....	None.....	\$0.05.....	\$3.60 per hour.
Farm Credit Administration.....	No charge if reasonable.....		
Federal Communications Commission (FCC).....	\$2.....	\$0.12.....	\$5 per hour for nonsubscribers; fee for subscribers varies.
Federal Maritime Commission.....	None.....	\$0.30.....	\$4.50 per hour, 1st ½ hour, no charge.
Federal Power Commission (FPC).....	\$2.....	\$0.08.....	\$0.90 per ¼ hour.
Federal Reserve Board (FRB).....	None.....	\$0.10.....	\$5.
Federal Trade Commission (FTC) <sup>1</sup> .....	None.....	\$0.20.....	\$3.50 per hour; 1st hour free.
General Accounting Office (GAO).....	\$3.....	\$0.25.....	None specified.
General Services Administration (GSA).....	None.....	\$0.25.....	Do.
Interstate Commerce Commission (ICC).....	\$1.....	\$0.25.....	\$3 per hour.
National Aeronautics and Space Administration (NASA).....	None.....	\$0.07.....	\$1 per ¼ hour; 1st ¼ hour free.
National Labor Relations Board (NLRB).....	Charge only if cost is significant.		
Office of Economic Opportunity (OEO).....	None.....	\$0.10.....	None specified.
Renegotiation Board.....	\$2.....	\$0.25.....	\$4 per hour.
Securities and Exchange Commission (SEC) <sup>5</sup> .....	\$2.....	\$0.22 (\$0.10) <sup>4</sup> .....	\$2.50 per ½ hour; 1st ½ hour free.
Selective Service System (SSS).....	None.....	\$1 (includes searches).....	
Small Business Administration (SBA).....	\$2.....	\$0.25.....	Total cost of employee time, equipment use, and other overhead.
U.S. Commission on Civil Rights.....	None.....	\$0.10.....	\$5.32.
U.S. Information Agency (USIA).....	\$0.50.....	\$0.20.....	\$5 per hour.
Veterans' Administration (VA) <sup>4</sup> .....	\$1.50 (search).....	\$0.25.....	\$3 per hour.

<sup>1</sup> Waiver provision for some categories of requests.<sup>2</sup> Figure published in CFR but no longer in use.<sup>3</sup> Regulations under revision.<sup>4</sup> If requesting party comes to agency and uses copying machine provided.<sup>5</sup> Private contractor assesses charges.

Senator MUSKIE. May I ask this question?

Do those fees exclude any possibility of any other charges? And under that table of fees could you be charged a prepayment of \$85,000?

Mr. NADER. You could be charged for the search time, and then be charged for the copying time.

Senator MUSKIE. So the table of fees does not cover the search time?

Mr. PLESSER. Yes, it does, sir.

Senator MUSKIE. At rates that could produce charges as large as \$85,000?

Mr. PLESSER. When you are talking about meat inspection reports for the whole country, and when the Department of Agriculture contends that it has to go through each individual report to take out opinions or recommendations, those figures become astronomical.

Mr. NADER. I might add that the commercial Xerox rate at various street corners in Washington is as low as 5 or 4 cents per page.

I might also add that the Department of Transportation is moving toward having a public document room for interested citizens to come and copy materials simply on self-help, the use of the copying machine. And that position might well be adopted by other Government agencies. The idea of a public document room I think is a very compelling one, to ease access.

Of course, one of the hidden assumptions here is that people come to Washington. What about people in Chicago or San Francisco or Atlanta? I recall one time about 9 years ago I asked the Federal Trade Commission for copies of the tire safety hearings which they conducted and which at that time were the only public materials on that subject. And they referred me to their commercial stenographic service, which was 75 cents a page. And Mr. Dixon, who was Chairman of the Federal Trade Commission, stated that the contract between the stenographic company and the Trade Commission prevented the Trade Commission's copying the hearings for the public, and we would have to go to the service, the stenographic service. Well, if somebody wrote in from Idaho, how could they possibly come down and just read the only extant available copy of the hearings at the Federal Trade Commission? It wouldn't have been possible. There is a geographical problem here which is not given adequate recognition.

The agencies have been left to themselves without any government-wide guidance, and they have failed to comply with the letter and intent of the act. Even when the courts have declared that certain types of information must be public in one agency, that agency or other agencies have refused to implement the policy set forth in the court's decision. The agencies have refused to adopt as precedent the law that has been adopted by the courts. Three separate courts, one court of appeals and two separate district courts have conclusively held that administrative staff manuals such as IRS agents' handbooks and Occupational Health and Safety Administration inspectors' manuals were to be made public. The Federal Trade Commission, after these cases were decided, promulgated new regulations which state that administrative staff manuals are to be kept confidential.

When questioned by my associate Mr. Plessner, the Federal Trade Commission General Counsel's office said that it was aware of the three cases, but would not change its policy merely on that basis. This is a theme consistent throughout the Government; an agency will comply



only either when it serves its purposes or when it is actually facing litigation or a court decision. An even more striking example of this was the case of *Schechter v. Richardson*, which was brought in the District of Columbia District Court. Malvin Schechter, editor of Hospital Practice magazine, sought access to and obtained eight nursing home inspection reports from the Social Security Administration as the result of court action. The Government did not appeal the case, but when Mr. Schechter approached the Social Security Administration for additional documents of identical nature, the answer was again no, and Mr. Schechter had to go to court again.

By the way, this tactic is used toward newspapers. If a newspaper's pressure is strong enough—as the Wall Street Journal did, for example, on the SEC—they will be permitted access to the specific materials requested, but no principle of access would be adopted for other people who may request the same information.

The decisions obtained from courts have been overwhelmingly favorable to the plaintiffs seeking access to information. In the period from July 4, 1967, to July 4, 1971, the House Subcommittee on Foreign Operation and Government Information reported that 99 cases were brought in court and the Government's refusal to grant access was sustained in only 23 cases.

Our experience strongly reaffirms this. My associates have initiated more than 25 cases, of which approximately 10 are pending. Of that number the district court has sustained the Government's withholding of information in only two cases, and one of those two is presently pending in the Court of Appeals for the District of Columbia on appeal. It is clear that when challenged, in the majority of cases the agencies have been unable to sustain their policies of secrecy. Much of what is wrong with the act is its procedural loopholes that allow Government agencies and employees of those agencies to flout it with impunity.

Through the Subcommittee on Foreign Operations and Government Information, which is chaired by Congressman Moorhead, the House has done a commendable job and can be credited with many of the recent gains in the area of agency compliance. That subcommittee has had extensive hearings and has various staff people performing constant oversight. However, there has been no corresponding activity on the Senate side. The hearings that began this week are the first set of significant hearings that the Senate has had on the Freedom of Information Act since the inception of the act.

There is also need for strong and unified leadership from the Senate in this area. It is unclear which subcommittee is responsible for the operational oversight of the act, and in any case none of the subcommittees have been doing anything. Chairman Moorhead cannot be called upon to fight alone. The Senate has a responsibility to continue to examine the operation of the Freedom of Information Act. The agencies unanimously opposed the passage of the act 7 years ago. They have been successful in making the Freedom of Information Act an almost meaningless statute, and the Congress should make it clear how it thinks the act should operate.

S. 1142 provides that each agency shall submit a report concerning its activities and performance under the Freedom of Information Act to the House and Senate Committees on Government Operations. This

reporting requirement is a necessary and useful addition to the act. However, it will only be important if the responsible committees assert some meaningful leadership and guidance in this field. The agencies have ignored the act to a large extent and they must be made accountable to Congress for their actions.

While badly drafted in some instances, the substantive portions of the Freedom of Information Act are flexible enough so that the courts fairly uniformly grant access to records and documents in the context of litigation. A rather extensive body of case law has developed which we believe is generally consistent with what Congress intended in passing the act—public access. However, the practical problems involved in attempting to obtain information from agencies under the act and the extreme reticence of the bureaucrats to comply with it are so great as to make the law established by the courts almost useless.

How many people can obtain a lawyer and endure the delay and the expense to avail themselves of perhaps a more broad judicial interpretation? Not many, obviously.

The great failure of the Freedom of Information Act has been that it does not hold Federal officials accountable for not disclosing information.

This is a central point that we would like to make today, Mr. Chairman.

As presently written, the criminal code, 18 U.S.C. 1905, makes a Federal official criminally liable if he releases trade secrets or commercially valuable information. The new criminal code proposed by Senator McClellan, S. 1 section 2-6F1, proposes to hold a Federal employee criminally liable if:

In violation of his obligation as a public servant under a statute or rule, regulation, or order under such statute, he (Federal employee) knowingly discloses any information which he has acquired as a public servant. . . .

There are no corresponding penalties for a Federal employee if he illegally refuses to grant access to documents in violation of his obligation as a public servant under the Freedom of Information Act. The natural tendency of a Federal employee faced with criminal penalties if he incorrectly discloses and no penalties whatsoever if he incorrectly withholds is to keep the requested documents or records secret. The employee who incorrectly withholds information must be held personally accountable and be liable for penalties. It would be appropriate to have sanctions such as mandatory suspension or termination of Federal employment or in certain circumstances where actual harm has resulted to have criminal penalties applied.

Senator KENNEDY. Do you want to just expand on that, Mr. Nader, in what areas you think criminal penalties ought be applied?

Mr. NADER. For example, Senator, in the area of health and safety. There have been repeated instances of Government agencies finding or obtaining the results of tests, or finding other information which signifies that there is a hazardous contaminant, let's say in meat products, such as polychlorinated biphenols in millions of chickens 2 years ago sold throughout the southeastern portion of the United States, by the way arising out of an unfortunate leakage of this PCB in a fish meal plant at Wilmington, N.C. And that case is an example of where excessive delay in the withholding of information from the public could lead to harm to the public's health and safety from the consumption of those chickens and eggs.



Senator KENNEDY. Who is going to take a job as a press officer or public information officer of a Department now if they know they could go to jail?

Mr. NADER. Somebody who wants to do the job. That is the point. The people who will take that job will be people who want to give out the information.

Senator KENNEDY. Who is going to want to appoint him to that job?

Mr. NADER. Well, that fortunately is the point of the provision. The point of the provision is, of course, that regardless of the desire of the chief administrator, the person who is the compliance officer is subjected to these sanctions, including the head of the agency.

Now, perhaps in more direct response to your question, if the Secretary of the Department is under this type of potential sanction, that Secretary will want to appoint somebody who is quite interested and committed to releasing information to the public, so as not to expose both the Secretary and himself to the application of the sanctions.

I don't want to imply, by the way, Mr. Chairman, that our specific reference to the new criminal code provision is in any way approval by us. That happens to be an exceptionally broad provision which requires further thought in another context when these provisions are up for hearing.

The Office of Economic Opportunity suspended Rudy Frank, an employee of OEO, because he allegedly released confidential information concerning the salaries of teachers of a day care center which was operated by a private corporation under contract with OEO. After Mr. Frank received notice of his suspension, Mr. Plessner represented him in a Freedom of Information lawsuit to obtain access to the day-care documents. After suit was filed, OEO gave these "secret" documents to Mr. Frank. However, his suspension still stands and the Government is opposing all attempts by him to recover his lost pay. Here they punished an employee for disclosing information which they themselves voluntarily disclosed once faced with having to defend their policy of secrecy in court. Instead of punishing Mr. Frank for disclosing what turned out to be public information, the OEO officials who suppressed these documents should be suspended or terminated.

I might add, in response to your question, Senator Kennedy, there have been instances of course of much greater gravity, where the Government has withheld information whose possession in the public's hands might well have served to advance the public safety.

For instance, for years, right outside the Denver airport, the storage of nerve gas in containers right above the ground near where the airplanes take off was shrouded in secrecy. A number of scientists from the University of Colorado finally issued a report showing the enormous hazard to hundreds of thousands of people in the Denver area from the presence of such long-stored nerve gas, in case there is a penetration of those tanks. And much information about chemical and biological warfare in terms of people exposed, such as in Utah, and elsewhere, to leakage of these deadly substances, is also in the category of long withheld information. We are dealing here with the kind of information which some day may be withheld at the expense of hundreds of thousands of lives; certainly nuclear power hazards, the storage of radioactive wastes, and other information fall in that category.

If the Government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after Federal employees are held accountable for their acts under this law will the people's right to know be guaranteed.

Above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right. If a citizen or a member of the press wants to obtain information from an agency, he must first request that information in writing. If he is lucky and has sent his request to the correct office, he might get a response in no less than a month. Once he has received an initial denial, he must again write the agency and appeal the denial of his information. He then must wait another month or two before he receives his final denial. Only then has he exhausted his administrative remedies and can he seek judicial relief. And despite the expedited procedures in the Act, this too may mean delay and appeals.

In August of 1972 two associates of mine requested access to the business review procedure of the Antitrust Division of the Department of Justice. This request of August 26, 1972, was not answered until November 24, 1972, when Deputy Attorney General Ralph Erickson denied all but a small portion of their request. They were forced by agency procedure to appeal this denial to the Attorney General and they did so on December 6, 1972. They never received any response from the Attorney General and consequently filed suit under the Freedom of Information Act on February 21, 1973, some 6 months after their initial request.

The information that they sought was a clearly identifiable set of records—correspondence between the Antitrust Division and companies seeking merger clearance under the antitrust laws. These have always been treated as confidential by the Antitrust Division. No unique legal argument or difficult factual evaluation was involved. There was a preexisting policy to withhold this information from the public, but it has taken 6 months and they still have not received a final denial, an assumed, technical prerequisite to a law suit.

Other examples abound, and it is our best guess that it takes in most instances 3 to 4 months before an agency finally acts on a request.

In most cases, but especially with the press, it is crucial that information is timely obtained. Information is needed usually for a particular purpose, and a delay of 3 months before you are even denied the information often defeats the purpose of requesting the information in the first place.

As one Washington lawyer once put it, his main job was to get information 3 hours before the rest of the public for his client. That was a way of his emphasizing that when truth is known is almost as important as what is truth.

Agencies are all too aware of this, and delay is often used as a way to discourage information requests. Even though the press was a major force behind the passage of the Freedom of Information Act, it has steadfastly refused to use it. Of the 150–200 cases that have been filed under the Act, only four have been brought by newspapers or individual reporters. The primary reason is the time it takes to get information. A story may be able to hold a week, maybe even a month, but rarely 3 or 6 months.



One possible solution to this problem not mentioned in any of the pending legislation is to eliminate the appeal process, that is, the internal agency appeal process. by so doing, you would immediately reduce by half the time it takes a request to get through an agency. There's no reason why a citizen must be forced to first request and then appeal in order to obtain information. Most requests are for information where the agency's policy is already established as to whether or not it is publicly available. In the 6-month example mentioned before, the denial of access to the business review procedure could have easily been completed in a week or two at most.

The legislation which you have before you provides that a new section 5 be added to the Freedom of Information Act, mandating that an agency must respond within 10 days to an initial request and within 20 days to an appeal. If an agency fails to act, the request is deemed denied. A maximum time limit is a needed addition to the act. However, it is imperative that agency procedure be consolidated to necessitate only one request. We propose that if a person requests information, he must receive the final decision of the agency within 10 days. If the agency fails to answer in 10 days, then the agency will be deemed to have finally denied that information.

In my testimony I refer to the case of *Mink v. EPA*. And in the interest of time, may I request of the chairman that that material and other material which I have skipped over in my prepared testimony all be included in the record?

SENATOR KENNEDY. Your full prepared statement will be included.

MR. NADER. S. 1142 provides that a successful plaintiff in a freedom of information action may recover reasonable attorney fees and other litigation costs in a case brought under the act. Figures prepared by the House Subcommittee on Foreign Operations and Government Information indicate that half of the cases that have been brought have been brought by private industry. Very few cases have been brought by individuals. The reason is cost. Even the simplest of freedom of information cases will incur legal expenses well in excess of \$1,000. This is hardly conducive to the private individual or public interest group that needs the information but will receive no financial gain as a result of obtaining it. Successful litigants should be able to recover the cost of exerting their right to information. This is especially important because of the large number of cases that the Government loses in court. If the Government had to pay legal fees each time it lost a case, it would be much more careful to oppose only those cases that it had a strong chance of winning.

In addition to amendments of the Freedom of Information Act, these committees have before them various other legislative proposals concerning executive privilege. The major problem with executive privilege is that the Congress has not in any meaningful way challenged the exercise of it by the executive. All of the executive privilege crises of the past have been resolved by settlement that almost without exception has confirmed the very dubious power of the executive to claim it. There is a question in many legal scholars' minds as to whether there is in law any precedent at all for executive privilege. Although executive privilege may exist in very limited circumstances, it is now being invoked far beyond whatever constitutional tradition is claimed for it by its adherents.

I am repeatedly amazed by the continuous use of the phrase “constitutional tradition” by administrative spokesmen. Somehow they seem to think that they are in England where tradition has indeed to substitute for a written Constitution. But fortunately in this country we have a written Constitution.

Senator ERVIN. I would like to ask you a question at this point.

Mr. NADER. Yes, sir.

Senator ERVIN. There is no express provision in the Constitution establishing executive privilege, is there?

Mr. NADER. No; there is not.

Senator ERVIN. So the sole question is whether it can be reasonably implied from the powers specifically given to the President?

Mr. NADER. Right.

Senator ERVIN. From the previous hearings on this subject, and the study I made on the subject, and meditation on the subject, I have come to the conclusion that there is a limited area in which an implied executive privilege may be inferred, and that is this: that at present it can be inferred from the Constitution that the President has the right to keep secret confidential communications occurring between him and his aides, or even occurring among his aides, which are for the purpose of assisting the President in the lawful discharge of some constitutional or legal obligation resting upon the President. I frankly cannot see any basis for any executive privilege which extends beyond that point.

Mr. NADER. I think, Senator, that it is important to make a distinction between constitutional interpretation, such as you have, and tradition. Tradition can embody a historic pattern of illegality. And I don't think that the word “tradition” can be given the constitutional significance that some administration spokesmen have given to it.

Senator ERVIN. That view was certainly sustained by the opinion of Justice Black in the *Steel Seizure* case where he said, even though there had been a long line of similar actions, that that line of action could not change the meaning of the constitutional principle.

Mr. NADER. Yes. And certainly I don't think the dispute in recent weeks has been over the area that you have set out which you think is a legitimate area of executive privilege. It has been over the almost daily expansion of the term “executive privilege” by various administration spokesmen.

Senator KENNEDY. Would you care to comment on Mr. Kleindienst's comment about the unchecked power of the President to withhold any information, to permit any employee to appear before a congressional committee, based solely on his own desires?

Mr. NADER. I think the authority for Attorney General Kleindienst's statement that the President can prohibit any of 2½ million federal employees from coming before a congressional committee is Attorney General Kleindienst. I think it was just another of his impulsively exuberant statements that are frequently characteristic of his testimony before Congress.

If we want to figure this out mathematically, it will only be a few generations before that definition of executive privilege covers the entire U.S. population. There is only one more step to go, and that is to say, not only all Federal employees, but all former Federal employees. And we have an expanding geometry that will include the bulk of the population probably by the middle of the 21st century.



Senator KENNEDY. Given your conclusion, what should the Congress do about it? Is it legislation, is it litigation, is it confrontation, or is it negotiation? What remedies are really available to the Congress?

Mr. NADER. The principal remedy, of course, is to join the issue in a judicial forum, and have the courts decide. As Professor Berger stated in his Law Review articles, that is the appropriate forum for decision. However desirable it is simply to join the issue and try to clarify this matter, I think eventually the Congress is going to recognize that what has de facto evolved in the deterioration of the checks and balances and separation of powers principle is a system, a congressional system that does not have the advantages of a parliamentary system and has the disadvantage of a parliamentary system.

The Congress cannot make the executive branch, in effect, accountable by its votes as a parliamentary system would be able to. And on the other hand, the Congress is not exerting sufficiently its review right, the rights of inquiry over the executive branch. And I think it is the worst of both possible worlds.

Senator KENNEDY. Mr. Kleindienst suggested that if the Congress didn't like his interpretation of executive privilege, the alternatives were either impeachment or voting the administration out of office. And, of course, voting the administration out of office isn't possible right now. So, we don't have the electoral process really to consider. And that leaves only the question, according to Mr. Kleindienst, of impeachment. What level of executive misdeeds do you think is necessary before the Congress ought to consider that?

Mr. NADER. First, I think it is important to note that the impeachment power goes not just to the President but to other Government officials. So as a practical matter, for example, the Congress might want to start with Mr. Phillips of the OEO.

Second—

Senator MUSKIE. Mr. Phillips hasn't been officially confirmed. Can you impeach someone who hasn't been officially confirmed?

Mr. NADER. I will await the court's decision in a court suit filed by several Senators to remove Mr. Phillips on the basis that he has gone beyond his 30 days as Acting Director without his name being submitted to the Senate for a confirmation.

I might say in this regard that Senator Harrison Williams wrote the President about February 23 asking for Mr. Phillips name to be sent up to the Senate. He is the chairman of the Senate Labor Committee that would pass on Mr. Phillips. He has not received an answer yet. I don't think history, recent history, or perhaps all U.S. history, has shown such a display of multifaceted arrogance toward the Congress such as is now coming out of the White House.

Senator KENNEDY. And you think still our only remedy ought to be through the judicial process, you don't think that the Congress ought to consider either holding up nominations or withholding authorizations or appropriations?

Mr. NADER. No; I certainly think that the Congress should use all the available tools it has left to do that.

Senator KENNEDY. Are you urging Congress to do so in the areas where they have withheld information they thought was necessary to perform their legislative function or their investigative function?

Mr. NADER. Very much so. I think the withholding of approval of nominations is not as effective as the selective withholding of appro-

priations. The blanket withholding of appropriations, of course, will make a lot of people suffer, and it will build up countervailing political pressure. But certainly the selective withholding of appropriations in any given departmental budget might send some effective messages home.

But as I was saying, I think eventually this whole series of issues involving the collision of the Congress and the executive branch will have to be resolved in a fundamental constitutional amendment or convention. I don't think your Founding Fathers with all their foresight prepared the Nation, almost 200 years later, for the kind of *de facto* creation of executive power that is now occurring.

Senator KENNEDY. Maybe they left that purposely there.

Mr. NADER. I think they were more concerned about congressional power than presidential power at the time, because the President was very weak in those days. He didn't have much of a bureaucracy. I think most of the Federal employees in those days were postmen, rather quaint.

Senator MUSKIE. Lighthouse keepers.

Mr. NADER. And lighthouse keepers.

But I think, for example, Mr. Chairman, that the two-third override is the most serious constitutional obstacle to redressing the balance between the branches. Here you have a President who can be elected by a plurality of the popular vote, in effect exercising powers that require a two-thirds override of the entire membership of the House and Senate. That is an awfully tough hurdle to overcome. And I think that is the main ultimate weapon which the executive branch has, of course, against the Congress, and they know it.

Senator KENNEDY. Let me ask you one question I asked Congressman Moorhead.

What agencies do you think have been particularly reluctant to disclose information, based upon your own experience, Mr. Nader?

Has that varied very much over the time that you have been pursuing your interests?

Mr. NADER. One could almost answer that question by saying, just knock on any door. And they have a pretty uniform reluctance to disclose information. Of course, I think the Department of Defense and the State Department are the most secret, because they wrap around themselves the blanket of national security and foreign relations. And I think the IRS has shown an excessive degree of secrecy, in addition to its dollars-per-page Xerox copying costs.

In our experience the Air Pollution Agency, when it was in the Department of Health, Education and Welfare, was the most open. They opened files, and gave us records, allowed us to sit in on meetings, and disproved, I think, very decisively the statement by many other agencies that similar behavior would wreck their delivery and administering processes.

I think the EPA has displayed on occasion an openness that is heartening.

But generally speaking, the norm is secrecy.

Mr. Plessner.

Mr. PLESSNER. I agree with Mr. Nader, we have had problems almost with every agency. I think the most lawsuits have been against the Department of Agriculture. In the field of meat inspection reports they have now seemed to change their position.



Certainly the agencies have been better. We find, I think, that the larger departments are usually worse than the smaller commissions, like the Securities and Exchange Commission. But that is not a flat statement, they just tend to be.

Mr. NADER. If I may just finish my last paragraph.

The first step that Congress must take is to challenge the use of executive privilege by the executive. Subpenas must be served and court challenges made. The Congress has totally failed in asserting its right to executive information. It has growled, but it has never grappled. It is long overdue that the Congress show some assertiveness on this matter and challenges the obvious and misconstrued use of executive privilege by the executive branch.

Frankly, I think the executive branch is exploiting the well-intentioned feeling by some Members of Congress to avoid a collision or a showdown with the executive branch. But I don't see how that collision, if you can call it that, can be avoided if we are to see a judicial determination of these issues.

Senator ERVIN. If I may interrupt you at that point. As I construe George Washington's farewell address to the American people, he stated in substance that the reason the Framers of the Constitution divided the powers of Government among the different departments was because they recognized that public officials have a love of power and proneness to abuse it. He stated further, in substance, that it was just as necessary to preserve the distribution of powers of Government among the different departments as it was to establish them originally. And he said in substance, that the Founding Fathers contemplated that the division of powers would be preserved because they assumed that each department would resist any efforts to encroach upon its constitutional domain at the hands of any other department of the Government.

He wound up this part of his farewell address with a statement to the effect that if the people ever become dissatisfied with the powers as distributed among the different departments as established by the Constitution, they should change that distribution by a constitutional amendment, as provided in the Constitution. He advised that there should be no change by usurpation, because usurpation is a customary weapon by which free government is destroyed.

Mr. NADER. Now, you are putting it on the line, Senator. Like Washington had his Cornwallis, you have your Nixon.

Just in conclusion, we submit for the record a transcript of a conference held by us on the Freedom of Information Act, and attended by the officials in government responsible for carrying it out. I think it is a helpful body of materials that might be of use to the subcommittee. [See Appendix, Volume III of these hearings, Freedom of Information, Part 1, Nader Conference.]

[The prepared statement of Mr. Nader follows:]

#### PREPARED STATEMENT OF RALPH NADER

Mr. Chairman, distinguished members of the Subcommittees on the Separation of Powers, Intergovernmental Relations, and Administrative Practice and Procedure, thank you for inviting me to present my views on the enforcement of the Freedom of Information Act and to comment upon S. 1142 which would amend that Act. Mr. Ronald Plessner, a lawyer working in the freedom of information area, is accompanying me today.

When President Johnson signed this legislation on July 4, 1966, he stated, "The United States is an open society in which the people's right to know is cherished and guarded." However, the experience of the past six years has shown that this "cherished" right of the American public is not well guarded by the Freedom of Information Act or by the government administrators who are entrusted with the duty to protect the public's right to know. On many occasions my associates and I have had experiences which indicate that the Act that we are discussing today has not guaranteed public access and has not accomplished Congress' intention to open government to public scrutiny.

Before discussing our experience under the Act and our specific comments on the proposed legislation, I want to describe the basic scope of the Freedom of Information Act. The Act applies only to executive branch agencies and departments and excludes the Congress. The Library of Congress and the General Accounting Office and the Cost Accounting Standards Board, all "agencies" of Congress, consider themselves exempted from the Act. The GAO, as well as various committees of Congress, undertake substantive investigations in which facts are gathered and information obtained. If we are to have openness in government, then all government should be open to public access. The GAO and the Congress function in much the same way as some agencies do, but unlike such agencies the GAO and some of the activities of the committees are closed to public scrutiny. Congress serves an important role in government and the law which guarantees public access to government should not exclude Congress.

In the course of our study of Congress, we have requested that each member of Congress put the Congress Project on Congressional mailing lists for press releases and newsletters. Less than half of the members have done so, and many refuse to give us access to this material. One member refused on the grounds that he disagreed with our views. Since there is no central file of newsletters and releases, we have not been able to obtain this otherwise public material. A member of Congress can restrict access to information which is otherwise public. There should be a law requiring any member to make such information available.

The Freedom of Information Act was passed to guarantee the public's right to know how the government is protecting the public interest. The public certainly has an equal if not a greater right in relation to Congress to know how its elected officials are performing their jobs in order that they can make more informed decisions at election time and influence them between election time.

Our experience with the Freedom of Information Act has been one of frustration and delay. Where the Act has worked, it has only been the result of intensive and constant effort. We have for the past several years sought access to various types of information through the Freedom of Information Act. Mr. Plesser now spends 100% of his time on access to government information and on litigating cases under the Freedom of Information Act (the only attorney in the United States who works full time on the Act.) We have also established a Press Information Center in conjunction with the National Press Club to provide assistance to members of the Press in their problems obtaining information from the government. Even with as much effort as we have put into the Act, to a large extent it has only been marginally effective for our questions. The problem is an overwhelming bureaucratic reluctance to comply with the Act and the lack of any leadership by either the Department of Justice or the Office of Management and Budget (OMB) in administering it. This is coupled with the fundamental failure of the Act to hold bureaucrats personally responsible for their failure to comply with the requirements of law.

The Justice Department and OMB have done almost nothing to ensure uniform compliance with the Act. One of the major problems of citizen access to information has been the cost of access. The Department of Agriculture requested the prepayment of \$85,000 in one instance and \$91,840 in another for access to documents. These and other instances were too much even for the OMB, and in one of their few directives under the Freedom of Information Act, then Director of OMB, George Shultz directed on May 2, 1972, that the fees "should not be established at an excessive level for the purpose of deterring requests for copies of records." He stated that fees should not exceed the actual costs of the services provided and that all agencies report back to him no later than July 1 of that year. Months passed and in January of 1973 OMB reported to the House Subcommittee on Foreign Operations and Government Information that it would not enforce this earlier directive and would permit agencies to charge what they wanted. OMB had taken a lone forward step but then fell back and has allowed agencies to maintain policies which even OMB admits



deter access. A copy of Mr. Shultz' letter of May 2, 1972, is presented for inclusion to the record.<sup>1</sup> The agencies have fee rates that range from \$.05 a page for copying charged by E.E.O.C. to \$1.00 a page for certain documents in possession of I.R.S. I submit for the Record a Table of Fees prepared by Mr. Plessner which reflect the various fees charged by Federal Agencies as of March 1, 1973.<sup>2</sup>

The Department of Justice has established an *ad hoc* committee to review final agency denials of requests for documents. This was established in 1969 to reduce the number of frivolous and losing cases that wind up in court. The government has not been winning any greater a percentage of cases since the inception of this committee. The Committee also does not advise agencies on a formal basis of recent developments in case law. The Department of Justice in 1967 issued an Attorney General's Memorandum on agency implementation of the Act. There have been numerous court decisions since that publication, but the Department has not seen fit to revise its memorandum and inform its clients of the current state of law under the Freedom of Information Act.

The agencies have been left to themselves without any governmentwide guidance, and they have failed to comply with the letter and intent of the Act. Even when the courts have declared that certain types of information must be public in one agency, that agency or other agencies have refused to implement the policy set forth in the court's decision. The agencies have refused to adopt as precedent the law that has been adopted by the Courts. Three separate courts, one court of appeals and two separate district courts have conclusively held that administrative staff manuals such as IRS agents handbooks and Occupational Health and Safety Administration inspectors manual were to be made public.<sup>3</sup> The Federal Trade Commission, after these cases were decided, promulgated new regulations which state that administrative staff manuals are to be kept confidential. When questioned by my associate Mr. Plessner, the Federal Trade Commission general counsel's office said that it was aware of the three cases, but would not change its policy merely on that basis. This is a theme consistent throughout the government; an agency will comply only either when it serves its purposes or when it is actually facing litigation or a court decision. An even more striking example of this was the case of *Schechter v. Richardson*, which was brought in the District of Columbia District Court. Malvin Schechter, editor of Hospital Practice magazine, sought access to and obtained eight nursing home inspection reports from the Social Security Administration as the result of court action. The government did not appeal the case, but when Mr. Schechter approached the Social Security Administration for additional documents of an identical nature, the answer was again no, and Mr. Schechter had to go to court again.

The decisions obtained from courts have been overwhelmingly favorable to the plaintiffs seeking access to information. In the period from July 4, 1967, to July 4, 1971, the House Subcommittee on Foreign Operation and Government Information reported that 99 cases were brought in court and the government's refusal to grant access was sustained in only 23 cases.<sup>4</sup> Our experience strongly reaffirms this. My associates have initiated more than 25 cases, of which approximately 10 are pending. Of that number the District Court has sustained the government's withholding of information in only 2 cases, and one of those two is presently pending in the Court of Appeals for the District of Columbia on appeal. It is clear that when challenged, in the majority of cases the agencies have been unable to sustain their policies of secrecy. Much of what is wrong with the Act is its procedural loopholes that allow government agencies and employees of those agencies to flout it with impunity.

Through the Subcommittee on Foreign Operations and Government Information, which is chaired by Congressman Moorhead, the House has done a commendable job and can be credited with many of the recent gains in the area of agency compliance. That subcommittee has had extensive hearings and has various staff people performing constant oversight. However, there has been no corresponding activity on the Senate side. The hearings that began this week are the first set of significant hearings that the Senate has had on the Freedom of Information Act since the inception of the Act. There is also need for strong and

<sup>1</sup> See p. 204.

<sup>2</sup> See p. 205.

<sup>3</sup> *Hawkes v. IRS*, 467 F. 2d 787 (6th Cir. 1972); *Stokes v. Hodgson*, 347 F. Supp. 371 (N.D. Ga. 1972); *Long v. IRS*, — F. Supp. — (N.D. Wash. 1972).

<sup>4</sup> Hearings, U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (pt. 4). House Subcommittee on Foreign Operations and Government Information. Mar. 6, 7, 10, 14, and 16, 1972, p. 1338.

unified leadership from the Senate in this area. It is unclear which subcommittee is responsible for the operational oversight of the Act, and in any case none of the subcommittees have been doing anything. Chairman Moorhead cannot be called upon to fight alone. The Senate has a responsibility to continue to examine the operation of the Freedom of Information Act. The agencies unanimously opposed the passage of the Act seven years ago. They have been successful in making the Freedom of Information Act an almost meaningless statute, and the Congress should make it clear how it thinks the Act should operate.

S. 1142 provides that each agency shall submit a report concerning its activities and performance under the Freedom of Information Act to the House and Senate Committees on Operations. This reporting requirement is a necessary and useful addition to the Act. However, it will only be important if the responsible committees assert some meaningful leadership and guidance in this field. The agencies have ignored the Act to a large extent and they must be made accountable to Congress for their actions.

While badly drafted in some instances, the substantive portions of the Freedom of Information Act are flexible enough so that the courts fairly uniformly grant access to records and documents in the context of litigation. A rather extensive body of case law has developed which we believe is generally consistent with what Congress intended in passing the Act—public access. However, the practical problems involved in attempting to obtain information from agencies under the Act and the extreme reticence of the bureaucrats to comply with it are so great as to make the law established by the Courts almost useless.

The great failure of the Freedom of Information Act has been that it does not hold *federal officials accountable for not disclosing information*. As presently written, the criminal code, 18 U.S.C. § 1905, makes a federal official criminally liable if he *releases* trade secret or commercially valuable information. The new criminal code proposed by Senator McClellan, S. 1 section 2-6F1, proposes to hold a federal employee criminally liable if "in violation of his obligation as a public servant under a statute or rule, regulation or order under such statute, he (federal employee) knowingly discloses any information which he has acquired as a public servant. . . ." There are no corresponding penalties for a federal employee if he illegally refuses to *grant* access to documents in violation of his obligation to a public servant under the Freedom of Information Act. The natural tendency of a federal employee faced with criminal penalties if he incorrectly discloses and no penalties whatsoever if he incorrectly withholds is to keep the requested documents or records secret. The employee who incorrectly withholds information must be held personally accountable and be liable for penalties. It would be appropriate to have sanctions such as mandatory suspension or termination of federal employment or in certain circumstances where actual harm has resulted to have criminal penalties applied.

The Office of Economic Opportunity suspended Rudy Frank, an employee of OEO, because he allegedly released confidential information concerning the salaries of teachers of a day care center which was operated by a private corporation under contract with OEO. After Mr. Frank received notice of his suspension, Mr. Plesser represented him in a Freedom of Information lawsuit to obtain access to the day-care documents. After suit was filed, OEO gave these "secret" documents to Mr. Frank. However, his suspension still stands and the government is opposing all attempts by him to recover his lost pay. Here they punished an employee for disclosing information which they themselves voluntarily disclosed once faced with having to defend their policy of secrecy in court. Instead of punishing Mr. Frank for disclosing what turned out to be public information, the OEO officials who suppressed these documents should be suspended or terminated.

If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after federal employees are held accountable for their acts under this law will the people's right to know be guaranteed.

Above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right. If a citizen or a member of the press wants to obtain information from an agency, he must first request that information in writing. If he is lucky and has sent his request to the correct office, he might get a response in no less than a month. Once he has received an initial denial, he must again write the agency and appeal the denial of his information. He then must wait another month or two before he receives his final denial. Only then has he exhausted his



administrative remedies and can he seek judicial relief. And despite the expedited procedures in the Act, this too may mean delay and appeals.

In August of 1972 two associates of mine requested access to the business review procedure of the Antitrust Division of the Department of Justice. This request of August 26, 1972, was not answered until November 24, 1972, when Deputy Attorney General Ralph Erickson denied all but a small portion of their request. They were forced by agency procedure to appeal this denial to the Attorney General and they did so on December 6, 1972. They never received any response from the Attorney General and consequently filed suit under the Freedom of Information Act on February 21, 1973, some six months after their initial request. The information that they sought was a clearly identifiable set of records—correspondence between the Antitrust Division and companies seeking merger clearance under the antitrust laws. These have always been treated as confidential by the Antitrust Division. No unique legal argument or difficult factual evaluation was involved. There was a pre-existing policy to withhold this information from the public, but it has taken 6 months and they still have not received a final denial, an assumed, technical prerequisite to a law suit. Other examples abound, and it is our best guess that it takes in most instances three to four months before an agency finally acts on a request.

In most cases, but especially with the press, it is crucial that information is timely obtained. Information is needed usually for a particular purpose, and a delay of three months before you are even denied the information often defeats the purpose of requesting the information in the first place. Agencies are all too aware of this and delay is often used as a way to discourage information requests. Even though the press was a major force behind the passage of the Freedom of Information Act, it has steadfastly refused to use it. Of the 150-200 cases that have been filed under the Act, only four have been brought by newspapers or individual reporters. The primary reason is the time it takes to get information. A story may be able to hold a week, maybe even a month, but rarely three or six months.

One possible solution to this problem not mentioned in any of the pending legislation is to eliminate the appeal process; by so doing, you would immediately reduce by half the time it takes a request to get through an agency. There is no reason why a citizen must be forced to first request and then appeal in order to obtain information. Most requests are for information where the agency's policy is already established as to whether or not it is publicly available. In the six-month example mentioned above, the denial of access to the business review procedure could have easily been completed in a week or two at most.

The legislation which you have before you provides that new section 5 be added to the Freedom of Information Act, mandating that an agency must respond within ten days to an initial request and within twenty days to an appeal. If an agency fails to act, the request is deemed denied. A maximum time limit is a needed addition to the Act. However, it is imperative that agency procedure be consolidated to necessitate only one request. We propose that if a person requests information, he must receive the final decision of the agency within 10 days. If the agency fails to answer in ten days, then the agency will be deemed to have finally denied that information.

Another related problem with the operation of the Freedom of Information Act is the time that it takes for an information case to proceed through the District Court. A survey<sup>5</sup> of the dockets of the United States District Court for the District of Columbia conducted by William Dobrovir, a Washington attorney, indicates that the average time it takes for a case to reach a final determination in that court is 294 days. It should be noted that that figure includes the 16 days that the court took in *Mink v. Environmental Protection Agency*, which received accelerated treatment. In most cases, in our experience, the period it takes the court to decide a case is over one year. This occurs even though the Freedom of Information Act states that cases brought under it are to receive preference on the docket and are to be expedited in every way. A major reason for this excessive period of time is that as generally provided by the Federal Rules of Civil Procedure, the government has 60 days to answer a complaint for all litigation where the government is the defendant. The Federal Rules allow private parties only 20 days. It has been our experience that almost without exception the government asks for additional time beyond these 60 days. In many cases 70 to 90 days or more have passed before a responsive pleading is filed. The 60 days that the gov-

<sup>5</sup> House hearings, *supra*, pt. 5, p. 1398.

ernment has to answer is perhaps defensible in other federal litigation, but it is not in Freedom of Information litigation. When the agency has finally denied access to the information at the administrative level, it has determined what its factual and legal position is. The 60 days does no more than unnecessarily further extend the time it takes for the public's right to information to be resolved. The proposed legislation here before you provides that the government respond within 20 days to a complaint. The adoption of this provision is needed if the Freedom of Information Act is to be effective.

S. 1142 provides that a successful plaintiff in a Freedom of Information action may recover reasonable attorney fees and other litigation costs in a case brought under the Act. Figures prepared by the House Subcommittee on Foreign Operations and Government Information indicate that half of the cases that have been brought have been brought by private industry. Very few cases have been brought by individuals. The reason is cost. Even the simplest of Freedom of Information cases will incur legal expenses well in excess of \$1,000. This is hardly conducive to the private individual or public interest group that needs the information but will receive no financial gain as a result of obtaining it. Successful litigants should be able to recover the cost of exerting their right to information. This is especially important because of the large number of cases that the government loses in court. If the government had to pay legal fees each time it lost a case, it would be much more careful to oppose only those cases that it had a strong chance of winning.

There has been one case where the courts have, we believe, misapplied the intent of Congress, and this should be re-evaluated. The Supreme Court recently decided *Mink v. Environmental Protection Agency*, denying Congresswoman Mink and 32 other members of Congress access to certain documents which pertained to the testing of nuclear weapons on Amchitka Island in November 1971. The government contended that certain of these files were classified for reasons of national defense and foreign policy. The District Court refused to examine the requested documents *in camera* and determine if they in fact were documents that were qualified to be classified pursuant to executive order, as required by the first exemption to the Freedom of Information Act. The District Court refused to determine whether or not there were included with or attached to the documents which may have been properly classified, documents which were not properly classified. The Court of Appeals held that in order to conduct such a *de novo* review, the District Court must review *in camera* the documents claimed to be classified. The Supreme Court reversed and held that the first exemption of the Freedom of Information Act only requires that in order to exempt documents, the government merely has to prove that the documents sought were in fact classified pursuant to executive order. As long as that is done, the District Court judge cannot look any further. In his concurrence, Justice Stewart stated that Congress "... has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." He goes on to say that Congress, "in enacting section 552(b) (1) chose ... to decree blind acceptance of Executive fiat."

The practical effect of the *Mink* decision has been and will be in the future, if not changed by legislation, to completely eliminate from the parameter of the Freedom of Information Act any document which could remotely be considered relevant to foreign policy or national defense. All an agency has to do is have an official certify that the documents are classified pursuant to executive order. Neither the courts nor Congress can review that decision. In effect, the court has created a blanket litigation-proof exemption to the Freedom of Information Act. This cannot have been the intention of Congress when it passed the Freedom of Information Act, and it should not be the intent of Congress now. S. 1142 contains an attempt to resolve the problem discussed by Justice Stewart by providing that wherever the agency claims that records are within the purview of the national defense and foreign policy exemption, the District Court may examine them *in camera* to determine if they "cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States." This will allow the District Court to review the material which the agency contends is secret. The courts should have the power in connection with matters relating to national defense and foreign policy to review agency decisions. If the judicial branch is not given this "check" on the executive branch, the executive will be able at will to render secret whatever information it pleases.



In addition to amendments of the Freedom of Information Act, these committees have before them various other legislative proposals concerning executive privilege. The major problem with executive privilege is that the Congress has not in any meaningful way challenged the exercise of it by the executive. All of the executive privilege crises of the past have been resolved by settlement that almost without exception has confirmed the very dubious power of the executive to claim it. There is a question in many legal scholars' minds as to whether there is in law *any* precedent at all for executive privilege. Although executive privilege may exist in very limited circumstances, it is now being invoked far beyond whatever Constitutional tradition is claimed for it by its adherents. The first step that Congress must take is to challenge the use of executive privilege by the executive. Subpoenas must be served and court challenges made. The Congress has totally failed in asserting its right to executive information. It has growled, but it has never grappled. It is long overdue that the Congress show some assertiveness on this matter and challenge the obvious and misconstrued use of executive privilege by the executive branch.

In conclusion, we see the problems of public access revolving around substantive and procedural barriers to information. The Freedom of Information Act can conceivably be a useful tool to inform the public about just how the government is protecting the public interest if these barriers are removed. We urge these committees to pass what changes are necessary and then to provide constant oversight on the executive to make sure that that branch is complying with the letter and spirit of the law. We also reassert that the Freedom of Information Act must apply to all governmental processes, executive as well as legislative. The Congress must be open to public scrutiny if the people's right to know is to be secure.

Senator KENNEDY. Senator Muskie.

Senator MUSKIE. I might state that George Washington won over Cornwallis.

Senator ERVIN. But he had to fight 7 years to win.

Senator MUSKIE. I just hope that we can find the battlefield.

In Senator Ervin's earlier questions, he raised the question of whether or not tradition could become in effect constitutional in its impact. And I have been wanting to put in the record since Mr. Kleindienst appeared the other day a statement of the court in the *Steel Seizure* case in the early fifties. The Supreme Court said: "That an unconstitutional action had been taken before surely does not render the same action any less unconstitutional." I think that is right on point with the point that you made.

In your testimony you refer to one of the provisions in a pending bill to reform the Federal Criminal Code. And there was some discussion at that point also outside your text. The provision that you cite reads as follows:

A person is guilty of an offense if in violation of his obligation as a public servant under a statute or rule, regulation or order issued under such statute, he knowingly discloses any information which he has acquired as a public servant and which had been provided to the government in compliance with a duty imposed by law. . . .

Now, this committee is going to conduct an examination of Mr. Kleindienst on these proposals for changes in the criminal law, the so-called Official Secrets Act, as I described it the other day. And it would not be inappropriate, if you wanted to supply any perspectives on that legislation, to supply them for the record of this hearing as well as the hearings that will be held, I am sure, before the Judiciary Committee.

Mr. NADER. We certainly shall, Senator Muskie. We have studied in some detail the Official Secrets Acts of the United Kingdom and Australia. And I must say that if there is one touchstone marking the

differences in political democracy between our country and those two countries, that touchstone is the Official Secrets Act. It is a tremendous inhibitor of civic and citizens action. It is a tremendous camouflager of bureaucratic stagnation, and in some cases corruption.

Senator MUSKIE. I think it would be useful at this point to put in the record the language of the British Official Secrets Act of 1911, so that people looking in this record can compare it with the language I have just read.

[The following text, with explanatory notes, of the Official Secrets Act of 1911 and 1920, is reproduced from the appendix of the (Franks) "Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911," published in London, September 1972, by Her Majesty's Stationery Office:]

SECTION 1 OF THE BRITISH OFFICIAL SECRETS ACT, 1911, AND SECTION 2 OF THE  
OFFICIAL SECRETS ACT, 1920

*Text of section 1 of the 1911 Act (as amended)*

Penalties for spying: (1) If any person for any purpose prejudicial to the safety or interests of the State—

(a) Approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act, or

(b) Makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) Obtains, collects, records or publishes or communicates to any other person any secret official code word or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy;

he shall be guilty of an offence.

(2) On a prosecution under this section it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place within the meaning of this Act or anything in such a place, or any secret official code word or pass word, is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

*Text of section 2 of the 1920 Act*

Communications with foreign agents to be evidence of commission of certain offences: (1) In any proceedings against a person for an offence under section 1 of the principal Act, the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or without the United Kingdom, shall be evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

(2) For the purpose of this section, but without prejudice to the generality of the foregoing provision—

(a) a person shall, unless he proves the contrary, be deemed to have been in communication with a foreign agent if—

(i) he has, either within or without the United Kingdom, visited the address of a foreign agent or consorted or associated with a foreign agent; or

(ii) either within or without the United Kingdom, the name and address or any other information regarding a foreign agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person;

(b) The expression "foreign agent" includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign Power



either directly or indirectly for the purpose of committing an act, either within or without the United Kingdom, prejudicial to the safety or interest of the State, or who has or is reasonably suspected of having, either with or without the United Kingdom, committed, or attempted to commit, such an act in the interests of a foreign Power;

(c) Any address, whether within or without the United Kingdom, reasonably suspected of being an address used for the receipt of communication intended for a foreign agent, or any address at which a foreign agent resides or to which he resorts for the purpose of giving or receiving communications or at which he carries on any business, shall be deemed to be the address of a foreign agent, and communications addressed to such an address to be communications with a foreign agent.

#### *Notes on section 1*

1. Unlike section 2 of the 1911 Act, section 1 is not limited to official information, though in practice most information which it covers is official. Offences under section 1 are, however, limited in two ways which make it much narrower than the catch-all section 2. First, no action can constitute an offence under section 1 unless it was done "for any purpose prejudicial to the safety or interests of the State. Second, an offence under section 1 must involve either a prohibited place (see such section (1)(a)) or material which is "calculated to be or might be or is intended to be directly or indirectly useful to an enemy" (see subsection (1)(b) and (c)).

2. The words "purpose prejudicial to the safety or interests of the State" involve a subjective test. These words are not directed to the actual or potential effect of the defendant's action, but to his intention. Subsection (2), and section 2 of the 1920 Act, then specify certain objective factors which may constitute evidence of this intention. Subsection (2) provides that the inference may be drawn, from the circumstances of the case, or from the defendant's conduct, or from his known character as proved, that his purpose was a purpose prejudicial. It also provides that, in the case of information relating to a prohibited place or a secret official code word or pass word, if the defendant was not acting under lawful authority, he shall be deemed to have acted for a purpose prejudicial unless he proves the contrary.

3. Section 2 of the 1920 Act provides that the fact that a defendant in a prosecution under section 1 of the 1911 Act has been in communication or attempted communication with a foreign agent shall be evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained information which is calculated to be or might be or is intended to be useful to an enemy. In most section 1 cases there is evidence of such communication.

4. Section 1 operates in peace as well as in war because "enemy" includes a potential enemy. An enemy, in this sense, may find a wide range of official information useful. The communication of information to a potential enemy is evidence of its possible use to him.

5. The general effect of these two tests—the "purpose prejudicial", and use to an enemy—is that section 1 covers those offences popularly regarded as spying. The section does not touch the communication or publication of official information of other kinds or for other purposes.

#### *Text of section 2 of the 1911 Act (as amended)*

Wrongful communication of information: (1) If any person having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Her Majesty or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Her Majesty, or as a person who holds or has held a contract made on behalf of Her Majesty or as a person who is or has been employed under a person who holds or has held such an office or contract—

(a) Communicates the code word, pass word, sketch, plan, model, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it; or

(aa) Uses the information in his possession for the benefit of any foreign Power or in any other manner prejudicial to the safety or interests of the State;

(b) Retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty

to retain it, or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(c) Fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass word or information;

that person shall be guilty of a misdemeanor.

(1a) If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, communicates it directly or indirectly to any foreign Power, or in any other manner prejudicial to the safety or interests of the State, that person shall be guilty of a misdemeanor.

(b) If any person receives any secret official code word, or pass word, or sketch, plan, model, article, note, document, or information, knowing, or having reasonable ground to believe at the time when he receives it, that the code word, pass word, sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, he shall be guilty of a misdemeanor, unless he proves that the communication to him of the code word, pass word, sketch, plan, model, article, note, document, or information was contrary to his desire.

#### *Notes on section 2*

1. The main offence created by section 2 is committed by a person who, "having in his possession any information which he has obtained owing to his position as a person who holds office under Her Majesty or a contract on behalf of Her Majesty", "communicates the information to any person other than a person to whom he is authorized to communicate it". In ordinary language, it is an offence under section 2(1)(a) for a Crown servant or Government contractor to make an unauthorised disclosure of information which he has learnt in the course of his job. The word "communicates" has its ordinary meaning. It covers the passing of a document or other record, and the transmission of information orally. All kinds of information are covered. The section contains a list, several times repeated, which includes code words, sketches, models, etc., but in each case this list ends with the all-embracing words "document or information". There is no limitation of subject matter, but section 2 applies only to "official information", in the sense described in notes 2 and 3.

2. The main class of information covered by section 2(1)(a) is defined by reference to two classes of persons. The first class comprises persons "holding office under Her Majesty". This includes not only civil servants and members of the Diplomatic Service, but also Ministers of the Crown, members of the Judiciary (from Judges of the Supreme Court to Justices of the Peace), members of the Armed Forces, police officers (by virtue of their office of constable) and others. By virtue of the definition in section 12 of the 1911 Act it includes any office or employment in or under any department of the Government of the United Kingdom. Employees of the Post Office and of the United Kingdom Atomic Energy Authority are deemed by the Post Office Act 1969 and the Atomic Energy Authority Act 1954 respectively to be holders of an office under Her Majesty for this purpose. The above-mentioned persons are for convenience described as Crown servants in this Report. Whether members and employees of public bodies on the fringes of central Government, and persons appointed by Ministers, are Crown servants for this purpose is in many cases unclear. The second class of persons specified in section 2(1)(a) comprises those who hold a contract made on behalf of Her Majesty, and their employees. Former members of both classes are also covered.

3. "Official information", as we use the term in this Report, is information which a Crown servant or Government contractor (in the sense explained in note 2) learns in his capacity as such. The unauthorised communication of such information by such a person is an offence under section 2(1)(a). A person who is in neither of these classes also commits an offence under section 2(1)(a) if he makes an unauthorised communication of official information which has been entrusted to him in confidence by a Crown servant. The meaning of "entrusted in confidence" is not defined. These words may bring within the scope of section 2(1)(a) a wide range of people, for instance those involved in the outside consultations frequently undertaken by central Government, which may be conducted in confidence.

4. Note 3 has described offences under section 2(1)(a) committed by those who are properly in possession of official information. It is also an offence under section 2(1)(a) to make an unauthorised communication of information "which



has been made or obtained in contravention of this Act". Some uncertainty attaches to these words, since nothing in section 2 speaks of its being a contravention of the section to make or obtain anything, whereas section 1(1)(b) and (c) create offences which use these words. The commonly accepted interpretation, however, is that when official information has been communicated in contravention of section 2, the recipient commits an offence if he in turn communicates that information without authority. This means that it is possible to have a chain of unauthorised communications, each link in the chain committing an offence under section 2(1)(a).

5. A Crown servant or Government contractor does not commit an offence under section 2(1)(a) if he communicates official information to a "person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it". The Act provides no guidance on the interpretation of these words. The way in which they are in practice interpreted by Crown servants is explained in paragraph 18 of the Report. In brief, implicit authorisation to disclose official information is regarded as flowing from the nature of each Crown servant's job. This interpretation can be adapted so as to apply to Government contractors and persons entrusted with official information in confidence. The meaning of the words quoted above in relation to other persons is obscure.

6. Section 2(1)(a) is concerned with the communication of official information, and section 2(2) with its receipt. Section 2(2) provides that, where a recipient of official information knows or has reasonable grounds to believe, at the time, that its communication to him constituted a breach of the Official Secrets Act, he is also guilty of an offence unless he proves that the communication to him was "contrary to his desire". It is immaterial whether the recipient makes any use of the information. If he in turn communicates it, he may then commit an offence under section 2(1)(a) (see note 4).

7. There are a number of other offences under section 2, less important than those discussed in the notes above.

(a) Under section 2(1)(a), an offence is committed by a person possessing any secret official code word or pass word, or any information relating to or used in a prohibited place, or anything in such a place, who communicates it without authority. This offence is not restricted to the Crown servants and the other classes of person mentioned in notes 2 and 3. All persons are forbidden to pass on information about prohibited places, however acquired. Prohibited places are defined in *section 3* of the 1911 Act, and include any defence "establishment or station, factory, dockyard, mine, minefield, camp, ship or aircraft belonging to or occupied by or on behalf of Her Majesty or any telegraph, telephone, wireless or signal station or office". The Secretary of State has power to declare other places (such as public utilities) to be prohibited places on the ground that information about them would be useful to an enemy.

(b) The other offences created by section 2(1)(aa), (1)(b), (1)(c) and (1A) are relatively straightforward. Subsection (1)(aa) and subsection (1A), which were added by the 1920 Act, both include the words "manner prejudicial to the safety or interests of the State", which gives them an affinity with section 1. The offence in subsection (1A), like that relating to prohibited places, can be committed by any person who has information about munitions of war in his possession, however he obtained it.

## OTHER RELATED PROVISIONS OF THE OFFICIAL SECRETS ACTS

### *The 1911 Act*

*Section 5* allows a court trying a person for a section 1 offence to find him guilty instead of one of the lesser offences under section 2.

*Section 6* provides a power to arrest any person who is found committing an offence under the Act, or who is suspected of having committed or of being about to commit such an offence.

*Section 7* makes it an offence for any person knowingly to harbour a person who has committed or is about to commit an offence under the Act. The sidenote is "Penalty for harbouring spies", but the section is not restricted to offences under section 1.

*Section 8* provides that no offence under the Act shall be prosecuted except by or with the consent of the Attorney General, or in Scotland of the Lord Advocate.

*Section 9* gives a power to grant search warrants where an offence under the Act is suspected.

*Section 10* applies the Act to all offences committed in any part of Her Majesty's dominions and to offences committed by British officers or subjects elsewhere.

*The 1920 Act*

*Section 7* makes it an offence to attempt to commit any offence under the Official Secrets Acts, or to solicit or incite or endeavour to persuade another person to commit such an offence, or to aid and abet and do any act preparatory to the commission of such an offence. The Court of Criminal Appeal has held that the second "and" in this section, which appears to have been a misprint, should be read as "or".

*Section 8* provides the maximum penalties for offences under both Acts. A person guilty of an offence under section 1 of the 1911 Act is liable to fourteen years' imprisonment (and the court has a general power to impose a fine of any amount); under section 2 the maximum term is two years (again with an unlimited fine in addition to or instead of imprisonment). There is also power, with the consent of the Attorney General, to try section 2 cases summarily, when the maximum penalties are three months' imprisonment or a fine of £50 or both. Section 8 also empowers the court to exclude the public from the trial of an offence under the Official Secrets Acts, if the prosecution apply for this on the ground that the publication of evidence would be prejudicial to the national safety. But sentence must be passed in open court.

Mr. NADER. There is now a movement in Great Britain to repeal or modify the Official Secrets Act. It is rather discouraging to see the administration in this country moving in the opposite direction. Of course, one way to defeat such a provision is to balance it out and simply say, those who withhold information are also subject to those same types of sanctions.

Senator MUSKIE. It may be that what is an ebbing tide on that side of the Atlantic is a rising tide on this side of the Atlantic, which we should resist. But section 2 of the British Official Secrets Act of 1911 makes it an offense for any person:

Having in his possession or control any article, note, document or information, which has been entrusted in confidence to him by any person holding office under Her Majesty, or to which he has had an access owing to his position as a person who holds or has held office under Her Majesty, to communicate that material to anyone not authorized to receive it.

And that language is closely comparable to the proposed change in our criminal law. And I think that we should take some warning from it.

In your testimony you note that the Freedom of Information Act amendments which are contained in S. 1142 would provide that District Court judges may examine documents in camera to see if the exemptions from disclosure being asserted are truly applicable. I think that for the record I would like to make a point that the language of the bill says that "The courts shall examine the matter de novo, including by examination of the contents of any agency records in camera, to determine if any such records or any part thereof shall be withheld under any of the exemptions set forth."

And so I make the point that it is mandatory and not permissive. And I think that from your point of view that would strengthen the language. It is important in this connection to refer to the concurring opinion of Justice Stewart in the *Mink* case, in which he as much as invited the Congress to correct what he believed to have been an error of the Congress in giving the impact to the language that the court recognized. Justice Stewart said: "Congress chose to decree blind acceptance of executive fiat."



I hope that the Congress takes that into account in considering the amendments to the freedom of information legislation.

Mr. Nader, I appreciate your contribution to this record this morning. And I do invite you to submit your analysis of the official secrets legislation, because we will get into it with Attorney General Kleindienst.

Mr. NADER. Thank you. We shall do so.

[No such material was received for inclusion in the record.]

Senator KENNEDY. Senator Roth.

Senator ROTH. I have two or three questions I would like to ask Mr. Nader.

I was particularly interested in your comments with respect to the Congress, because I have found that Congress itself is very much interested in lecturing the executive branch. But it is very difficult to get even some simple reform in the Congress itself.

For example, Senator Humphrey and I proposed earlier this year that, as a general rule, executive markups in congressional committees be open to the public. Our proposal was defeated. I think that maybe we ought to put our own house in order before we become too critical of the other branch.

Mr. NADER. I don't think the country can wait that long, Senator.

Senator ROTH. You may be correct.

However, my question to you, sir, is: Do you have any specific suggestions in this area of the public right to know as to congressional procedures?

Mr. NADER. Yes; I think most of them have been made by various Representatives and Senators through open meetings, which I am pleased to observe are on the increase. Just recently even the House Public Works Committee had an open session on marking up the highway bill, which proved the importance of openness.

There was a direct connection between the openness and the move that was made successfully to delete a portion of the bill because it was in violation of an obscure House rule.

Another is that when a congressional committee comes out with a report that it make publicly available the documents that are the basis of decision, except for very strict limitations, to protect say, the reputation and privacy of the individual, not corporations, and that it make available how the subcommittee, or the subcommittee staff arrived at their investigative reports. This permits an evaluation of the report, and does exactly for Congress what that same procedure would do for a government agency of the executive branch.

There are a number of other proposals, but I think the proposals are way ahead of their support. And the Mathias-Stevenson committee and other committees in the House have gone through that, I think, with some particularity.

Senator ROTH. I think in fairness, to put a nonpartisan note in these hearings. I should point out my own personal experience in trying to get information.

Back in 1966, when I was a freshman Congressman, I tried to identify the hundreds of Federal categorical programs. We couldn't even get the names of the programs. At that time OEO, for example, refused me their telephone book, because they said that was confidential information. But the more serious charge—and I don't think this is a

partisan problem, but rather a basic problem with bureaucracy—is that HEW refused to answer any of my questionnaires on the over 400 programs.

So, I think that in fairness it should be pointed out that this is a long-standing problem between the two branches of Government.

One of the things that concerns me is: Are we reacting to a particular set of circumstances today and failing to consider what happened in the past? If you go back in the fifties—and I was not here at that time—there were many who were concerned about Senator McCarthy's harassment of the executive branch. In fact, I have got here an editorial from the New York Times which said at the very outset of the fight between Senator McCarthy and the Eisenhower administration:

This newspaper has maintained that the fundamental issue is an attempt on the part of the legislative branch in the person of Mr. McCarthy to encroach upon the executive branch in complete disregard of the historic and constitutional division of powers that is basic to the American system of government. The President has been late, but not too late, in recognizing the deep significance of this issue, and standing up to it while the committee itself has apparently swallowed Mr. McCarthy's contention that he and it are entitled to know and pass judgment on every word and every thought that transpires within the executive departments.

I guess the question I am really trying to raise with you is this. Is there a balancing of needs here, or can we say that there should be no limitation upon the rights of Congress? If we do so, are we in danger of running into another problem like that of 20 years ago? Are we reacting too much to the immediate circumstances?

I wonder if you would care to comment on that.

Mr. NADER. I think, looking back on your analogy, that a great deal of what Senator McCarthy was probing was in the military security area, or what he thought was the national security or military security area, which I don't think is at the core of the concerned Members of Congress today.

I don't think there is any serious challenge about that area. It may well still be a serious problem in the judgment of many. I think we are talking here about things like impoundment of funds. We are talking about reorganization of the executive branch. We are talking about not sending up appointments for confirmation by the Senate. We are talking about making foreign treaties but calling them executive agreements in order to avoid the ratification power of the Senate. We are talking about not meeting statutory deadlines. We are talking about not sending up Federal officials dealing with a matter of great relevance to the integrity of the electoral process. This is the Watergate situation.

Senator ROTH. I may just point out again, that at least for the moment, I wasn't directing my question toward the particular problem of impoundment. I was thinking of some of the related questions with respect to powers. Going back to the New York Times editorial, where it was critical of Mr. McCarthy's contention that he and Congress are entitled to know and pass judgment upon every word and every thought that transpires within the executive branch, I think this more general issue of the extent of Congress' right to know is what these hearings are very much concerned with today.

It is only part of the overall problem, I will agree with you on that. But do you foresee any problem with respect to the McCarthy hearings from that standpoint?



Mr. NADER. Yes, I see a problem with the conduct of the hearings pillorying individuals without giving them due process, and releasing accusations against them in the press through the particular investigative committee. Those are all very real problems, and Congress has got to face up to them even though perhaps there is no committee now performing that way.

But with full recognition for that problem, Senator Roth, I think that there is a large area here where the shoe is on the other foot. And I think that is the area that we are focusing on.

Senator RORN. Let me emphasize that I very much disagree with the administration's point of view as to executive privilege, and some others. But I am concerned that in trying to solve the problem, we reach a proper balance.

I have one final question. It was proposed in some of the legislation last year, that we might have an independent commission to oversee the classification and declassification system. One of my concerns is that, and I don't care who is in power in the executive branch, the tendency is to not want to release information.

Do you think there is any merit to some kind of an independent agency overview of this problem?

Mr. NADER. There might be if it is part of Congress. You see then the agency takes advantage of the natural countervailing forces that operate between the two branches of the Government. You see, the Justice Department was supposed to be the arbiter here for the agencies. And they haven't done it at all, they have given a very poor performance. I don't know why another agency would be able to escape from the wing of the White House's shadow.

Senator RORN. I think you make a good point about having it report directly, and, of course, it could be a commission, not a department. Thank you very much.

Senator KENNEDY. Thank you very much, Senator Roth.  
Professor Miller?

Mr. MILLER. May I just ask one question, Senator.

Last fall, the Congress passed, Mr. Nader, as you know, the Advisory Committee Act. Do you know the present status of how OMB has interpreted that implementation of the regulation? The purpose of the act was to open up advisory committees to public scrutiny and public information. And as I understand it, there has been an attempt, an initial attempt, in effect, to scuttle that act.

What is the present status of that?

Mr. NADER. I think, like so many other good proposals from the Congress, the bureaucratic accountability is not going to be forthcoming until the individuals within the agencies and departments are readily responsive. I think cutting through so many of the problems that Senator Ervin has concern with, among others in this body is, how do you deal with offensive refusal to comply with the laws that are passed through Congress. And we have found that the one most important single reform that can be made—and it requires a great deal of thinking, and consideration of due process safeguards as well—is to have the individuals in these agencies and departments be subjected to a potential sanction, potential process of accountability, and not have the agency itself, or the department itself, be like a buffer shielding the individuals within those departments and agencies from accounta-

bility. We have never faced up to this at any level of government in our country. We have never permitted the people going through the due process of the law to reach over the bureaucratic buffer and impose the requisite sanctions, whether they be demotion, suspension, expulsion, or other similar effective ways to get the message home.

As far as your question is concerned, we have just confronted the situation where the Advisory Council to the Cost of Living Council has been holding meetings in utter secrecy, where there is evidence that legal counsel have warned their superiors of this problem, to no avail. And as one example of a very, very sensitive and important area precisely forecast by the legislation, there is no compliance.

Mr. PLESSER will elaborate on this briefly.

Mr. PLESSER. Just briefly on the Federal Advisory Committee Act. Professor Miller, one of the sections of the act says that the free access to meetings doesn't apply as to matters relating to one of the exemptions of the Freedom of Information Act. OMB in its regulations has taken that to mean in connection with the fifth exemption, which states interagency memorandums and intraagency memorandums, that a meeting of an advisory committee can be closed to protect the internal communications of that advisory committee, and the communications of that advisory committee with the agency that it advises.

In practicality, the only purpose of an advisory committee is to deliberate and to advise. So under our reading of OMB's interpretation, there is no instance where an agency, in compliance with OMB regulations, could not close an advisory committee. And the purpose of the Advisory Committee Act, as you know, was to provide public access. And I think that this has put into effect a total loophole to the effectiveness of the act.

Mr. MILLER. So would you agree that in the case of an appeal of a congressional act by an administrative agency, that the facts bear that out?

Mr. NADER. Yes. You see, there is no sanction in the act that you refer to, Professor Miller; there is no sanction.

Mr. PLESSER. Unlike the Freedom of Information Act, you can't even go to court as a matter of right under that act to get a justification; you have to go in under a general mandamus.

Mr. MILLER. The factual question, the advisory committees, generally speaking, are not open to the public as the Congress wishes, is that correct?

Mr. PLESSER. Some advisory committees are now open. Some portions of them are open, and some portions of them are closed. As I read the legislative history of the Federal Advisory Committee Act, there was an intent of Congress to open the whole process of outside individuals advising the Government and to make that process public. That has not been accomplished by that act.

Mr. NADER. Moreover, the requirement that comprehensive minutes be made available is routinely circumvented by most perfunctory notation of what went on at the meeting.

Senator KENNEDY. Professor Bickel.

Mr. BICKEL. Mr. Nader, if you are going to propose sanctions—and I agree with you, obviously the act as it is now drafted virtually assumes it—you can have the prior problem of having to deny sanctions, especially if they are criminal sanctions because you have to



make it pretty clear what a fellow has to make available to you if he is going to act at the hazard of even the sanction of discharge, let alone criminal sanctions. I would like to probe that with you for a minute, if I may.

You mentioned, for example, that you were after the records of antitrust settlements that the Justice Department made. I assume those records would contain negotiations, exchanges of position—you know what a negotiation is like—internal memorandums, somebody within the Justice Department making a suggestion to a superior, or perhaps for settlement or against it, what have you, all kinds of things of that sort that enter into a decision. And it seems to me—and I am taking up where Senator Roth left off—that that was the issue in the McCarthy period, it wasn't just probing international security matters, it was that he was trying to expose to the public the decision-making processes of the Government agencies, and get before him the fellow who made the recommendation, I don't know whether it was before McCarthy's or some other committee, concerning whether Dr. Condon be given security clearance or not be given it. And the position that the Times took and many of us took in that period, Mr. Nader, was that that was destructive to the capacity of the Government to make decisions and to act, because if you knew that whatever you recommended to your superior officer would be made public, you would be very cautious.

That is why it is said that McCarthy destroyed the State Department, and the thing isn't effective to this day in consequence of what McCarthy did. That is the point that David Halberstan makes in his book "The Best and the Brightest."

It seems to me that it was a very serious problem which we haven't even scratched the surface of.

MR. NADER. In response to your point, first of all, if you are going to have criminal sanctions, you had better have specific provisions in the act. And I see some of these amendments that Senator Muskie has added as being in the direction of greater precision to reduce the ambiguity and the vagueness that the existing act supplies in excessive abundance.

Second, the question of how deep do you go—by the way, the request for the Business Review materials, they are not really that detailed, the requests were simply for the decision and the basis or reasoning of the decision by the Antitrust Division.

MR. BICKEL. The basis of the decision has to mean what went on internally. You have heard the same thing with drafting a congressional report. What would that consist of? It would consist of Mr. Edmisten's writing a memo for Senator Ervin saying that we ought to put "X" in the report. If Mr. Edmisten knows that anything he writes will be made public, he will be very cautious in what he writes.

MR. NADER. That goes to the degree as to whether we should protect illegitimate inhibitions in a society. That is obviously the internal question. But another argument can be made for the position that people will not recommend in supportable or otherwise politically inspired or campaign fund inspired statements, if they know they have to be justified in the open sunlight. I have heard your type of response made many times in defending secret congressional committee meetings, that it would inhibit full discussion.

Point 1, it might indeed inhibit the kind of special pleading that the Member of the House or Senate doesn't believe in personally, but is doing for exterior reasons of constituent support.

And second, I think we have got to take those risks in a democracy and in government with legitimate civil libertarian safeguards. I think there has been a lot of thought obviously on what those legitimate civil libertarian safeguards are for government employees as well as for citizens, and they should in all fullness be part of this type of legislative proposal.

Mr. BICKEL. If I may pursue that just for a moment, because I think it is near the heart of the matter. Suppose I were a Senator unhappy with the decision in *Brown v. Board of Education* in 1954, which was a decision of much consequence, I think, to the country, as many of the things that the Antitrust Division of the Justice Department, or the Agriculture Department does. And suppose I were convinced that if the deliberations of the court and the materials that its law clerks dug up in the Library of Congress and brought to the attention of the Justices were only aired in the salutary air of publicity, we would all know how the decision was made, and we would know what to criticize about it, and we would safeguard ourselves from having such terrible decisions made against us in the future, because in the future, law clerks and Justices would know that these little special pleadings that go on in their conference room would be aired. I take it you would agree that that would be destructive of the judicial process. And I am puzzled that you would think that the decisional process elsewhere isn't as fragile and as destructible as I must say we all thought when Joe McCarthy was riding high.

Mr. NADER. Let me suggest that if the Congress had adhered to certain freedom of information principles in the era of Senator McCarthy, he could not have gone as far as he did in violating the civil liberties of many individuals. The fact that he could——

Mr. BICKEL. I am not talking about civil liberties; I am just talking about the judicial problems.

Mr. NADER. In essence, that is what it involves.

Mr. BICKEL. No.

Mr. NADER. And the fact that he could is attributable to keeping secret the so-called evidence that he had and not exposing it to cross-examination.

Turning to a point of substantive decisionmaking, as I am sure you know, this is simply an expression of different philosophy as to what people will say and do under confidential situations and under open situations. My experience is that on balance, the public interest is best served, candor is best served, a supportable argument process is best served, by an open process.

Mr. BICKEL. In the judicial process?

Mr. NADER. In the judicial process, because what you have in effect are the adjudication of individual rights, regardless of the enormous social repercussions. traditionally we have permitted a greater process of confidential and deliberative activities of judges and clerks. I don't think that one has to make a decision on that point in order to make a decision on executive agency deliberations. I don't think we have enough experience in the openness of the judicial arena; as you know, Professor Kalven a number of years ago began studying juries.

Mr. BICKEL. And hit a very sensitive nerve.



MR. NADER. And hit a very sensitive nerve. But the point he made, and made quite compellingly, is that the general sentiment in this country is that when a court which can decide the fate of an individual is open to that degree, the individual's rights are violated. And I think he also made another point, that we don't have enough information to make that kind of determination for the courts. And I think that we might well learn more of the way courts behave if we start with the executive branch in Government. I think when you are dealing with a situation setting health and safety standards or deliberating on military policy, the immediate and general interests of the population demand a greater disclosure and a greater accessible role. When it comes down to deciding whether somebody is going to be adjudicated guilty of a crime in court, I think one has to be exceptionally careful to shield the courts from undue political pressure. That is the whole definition of the judicial process. I don't think that is the definition of the executive or administrative process in our branch of Government.

MR. BICKEL. If I may digress a second, I just want to leave one point, which is that we are talking a little bit at a cross purpose. I didn't put before you a criminal case, I put before you *Brown v. Board of Education*, which was a policy decision of major proportions. And we are talking at cross purposes in that we are confusing, or at least, if I may say so, you are attempting to confuse problems of simple liberties, the privacy that is owing to an individual who finds himself enmeshed in the processes of the Government on the one hand, and on the other, the need of privacy in the decisionmaking process which can be destroyed if at every step it is open to public scrutiny. We disagree on that.

And I don't intend now to pursue it.

MR. NADER. I don't want to convey the impression that there is no need for limits here, Professor Bickel. I do want to convey the impression that we are dealing with an area where the need for limits is hardly an issue. We are dealing in a preliminary area of disclosure.

MR. BICKEL. It is the immediate issue, if you are going to have criminal penalties or any kind of penalties, you are going to have to define what the limits are before you apply penalties.

MR. NADER. Of course. That is what I would suggest that these amendments would help to do.

But in terms of our philosophical point as to whether we should have criminal penalties as deterrents, I don't think we are in that arena, I don't think that is—that arena is not the concern of these subcommittees. I think the arena concerned is a blanket denial, a blanket comprehensive assertion of executive privilege, sweeping over 21½ million employees.

MR. BICKEL. I agree with that. Obviously I wasn't talking about the Kleindienst testimony, which is way out in left field.

MR. NADER. As far as your point about *Brown v. Board of Education*, there is a legitimate area for considering whether such records should not be available after a convenient statute of limitations.

For instance, when we requested the records in the Justice Department for an antitrust suit that was completed in 1939, the answer was no, there is no statute of limitations for opening up these materials for scholarly or other assessment.

Senator ERVIN. Mr. Chairman, before the committee recesses, I would just like to state that I find myself in the unfortunate position of having two committee meetings this afternoon, plus the necessity of spending a good part of the afternoon on the floor. For that reason I may very unfortunately not be able to hear all the testimony of Professor Berger. I regret that very much, because he is one of my legal heroes. And I think that he has done more research, and has a sounder understanding of things in the field of executive privilege than any other person I know.

Senator KENNEDY. We will continue, I have one of those sessions that you have this afternoon myself. So we will continue, if it is agreeable with Senator Muskie.

We want to thank you very much, Mr. Nader. Your testimony will be very helpful, and very worthwhile. And we appreciate the wealth of your experience, having been involved in this Freedom of Information Act from a litigation point of view, and contesting it. And your comments will be very helpful. We want to thank you very much.

Mr. NADER. Thank you, Mr. Chairman.

Senator KENNEDY. Our next witness is Prof. Raoul Berger, a senior fellow at the Harvard Law School, who is one of the Nation's leading academic authorities on the subject of executive privilege.

Professor Berger served in various legal capacities in the executive branch, was a private practitioner in Washington, and entered academic life in 1962 at the University of California.

I understand that you have recently published a book entitled "Impeachment." Considering Mr. Kleindienst's assertions on Tuesday, we may take advantage of your expertise in that area also.

#### **STATEMENT OF RAOUL BERGER, CHARLES WARREN SENIOR FELLOW, HARVARD LAW SCHOOL**

Mr. BERGER. Permit me first to say in self-defense, Mr. Chairman, that I have become a "leading authority" by default. Nobody has ever taken the pains to look at the problem in depth; and since I did put in several years studying it, I have dug up some facts. I claim no more authority than the facts will warrant.

I am a little troubled, because it is late, and particularly because Mr. Kleindienst's unfortunate statement ties into a great deal of material which I would like to spread before you. Just cut me off whenever your time requires.

Senator KENNEDY. We want to make sure your full statement is printed in its entirety in the record. It is an extensive one. Perhaps you could summarize it and highlight it and make whatever comments you would like.

Mr. BERGER. The whole problem with executive privilege is that it rests on unproven assertions by the executive branch; in fact, Mr. Chairman, they have brainwashed the congressional branch. So we hear brave talk about executive privilege, which as George Ball said, is a "myth without constitutional foundation."

And we talk, as for example, our esteemed friend, Chairman Moorhead did, about "limiting" executive privilege. You are "limiting" nothing. And at the very outset I would say to you, this is a phrase that you ought to abjure altogether, because you are lending credence to something that is a myth and should be treated as a myth.



From here on out I would say of the executive claim that there is a constitutional right to withhold information from Congress, that there is no such thing as executive privilege, root and branch. To demonstrate that calls for accentuating the positive instead of being on the defensive.

But let me first direct myself to a remark the chairman made about submitting this to the courts; it gave me particular pleasure, because in 1965, at a time when this matter was quiescent, I made a similar proposal. I would join Senator Roth in saying that this is a non-partisan problem, it is a problem that goes beyond party, it is a problem of restoring the constitutional equilibrium, it is an attempt to resume your place in the sun. Without information you are strangled; and if you are strangled, democracy is paralyzed.

So, I welcome your espousal of the notion that this should be submitted to the courts, not because I think that the position of the President has any color of law, but because we have here two conflicting claims of power, a claim by the Congress to know, and a claim of plenary power by the President to withhold. So you have got a boundary dispute which, as Madison said long ago, neither party can resolve, but which the courts must decide. Apparently, Mr. Kleindienst reads Madison as if a claim to withhold constitutes a conclusive determination of that boundary dispute, a case of mental astigmatism.

Now, in espousing judicial review I don't want to scuttle the position that Senator Ervin very justly takes, and Senator Stevenson too lightly pooh-poohed, that there is an existing mechanism for review. There is a procedure to issue a subpoena, and the Senate may decide that noncompliance therewith is a contempt. And let's have in mind that the Senate decision is preliminary to judicial review. As you know, a contempt is a statutory crime, but it is a statute we can't expect Mr. Kleindienst to enforce against the administration. That is where some other legislation could be useful.

But there is existing judicial machinery. When Senator Stevenson said it has never been done, he is mistaken. A contempt has not been brought against a public official simply because you have always decided not to push the matter. But starting with *Anderson v. Dunning*, 1821, followed by *Jurney v. McCracken*, and *McGrain v. Daugherty* in 1927, the power of contempt has been recognized. You might not choose to exercise the contempt power against an official, but it can be so used. You don't need my word for it, because when Assistant Attorney General Rehnquist was being interrogated by Congressman Moss, he conceded that this same power could be exercised against an official.

So you have an established procedure which gets you into court: the arrest for contempt is merely a mechanism which enables the arrested person to seek a writ of habeas corpus, and he can be out of your guardroom in 20 minutes. It is a mechanism for court review that is established, and you can use it.

Having said that, Mr. Chairman, I would still like, if you will allow me time later, to return to the problem of having some fresh legislation on the books. You have some legislation on the books right now. But you have omitted to supply the enforcement machinery that you give to every administrative agency.

So much for that.

Now, as to Mr. Kleindienst, his position struck me as most unfortunate. He was relying on executive boilerplate, because ever since Attorney General Rogers issued his memorandum in 1958, that has been a bible for the executive branch. Every time somebody has to come up from the Government he takes several slabs of this bible and staples them together to make a statement. They have never gone behind the Rogers memorandum.

May I remind you that Rogers claimed an "uncontrolled discretion" of the President to withhold. He didn't spell it out in numbers; he didn't have to; "uncontrolled" reached far enough. As a matter of fact, he was so bold as to suggest the President's discretion couldn't be controlled by the courts either, not merely by the Congress. So you have Caesarism rampant back in 1958.

Now, I would like also, if you will indulge me, to differ with the chairman on another thing. This is not an area which was left purposely vague, I hope to show. It is perhaps not quite as clear as is the delineation of the war powers, which later became murky because of a lot of bootstrapping assertions of power by the President. Therein is the murkiness.

Perhaps I ought to say one thing right now about Senator McCarthy. God knows, I am not an apologist for him. But it is a mistake to quickly conclude that what was bad for McCarthy is good for the country. McCarthy was a special situation; Congress should have that ghost in front of it all the time, because there would have been no McCarthy if there had been a responsible Congress that was ready to censure him for his excesses. You cannot let your committee chairmen run wild. In every case before you go into court, there should be Senate concurrence, not merely action by a committee, because you should always have in mind McCarthy and others of that ilk.

But having said that, McCarthy was a solitary incident. There were 34 unwarranted withholdings, Senator Roth, in the Eisenhower administration after McCarthy. They withheld the information on the conflict of interest in the *Dixon-Yates* case, which had skullduggery at every stage. The Supreme Court set aside the contract. Then there was maladministration of foreign aid in Peru which Eisenhower would not disclose. No sooner did President Kennedy take office than he reversed it.

Innumerable congressional investigations, reaching back to 1792, prove that this has been a magnificent means of oversight of the executive branch. That is what it was intended to be.

Now, if you really want to get away from the mere exchange of expletives, we must take a look at history. And you have to be patient, in order to understand the strength of your own position. I want to put before you some materials I haven't published, because I have been working for 20 months to revise my earlier study. I am going to complain for the first time about a lack of attribution, because Mr. Kleindienst lifted from my article a statement by Madison which the executive branch hadn't dug up for itself but which I turned up in my earlier study as the most powerful statement that could be mustered for the executive branch. Unhappily Mr. Kleindienst only read from A to B, he didn't go to C, so that he could see that Madison's position was rejected by the House.



Let me turn to the history. One of the mistakes that has been made right along—and I swallowed it myself in 1965—is to tie the power of investigation too closely to legislation. A moment's reflection will show that is too narrow a route, because *United States v. Watkins* held that there is power to probe the executive branch for "corruption, waste and inefficiency." Do you have to pass an act every time you find corruption? Of course not. The explanation lies in the fact that legislative inquiry had its inception as a preliminary to impeachment.

I took the pains to go through about 130 years of parliamentary debates. I didn't read every one of them, because it would take a lifetime. But I did a sampling across that period, and I want to summarize it for you.

To begin with then, the power of inquiry didn't start with legislation, it started with impeachment. And it started with a very great name, Francis Bacon, then Lord Chancellor. He was accused of corruption.

I mustn't get bogged down here.

Senator KENNEDY. Don't leave us in the air.

Mr. BERGER. You will have to stop me.

Senator KENNEDY. Can you tell us about Francis Bacon?

Mr. BERGER. Yes.

Francis Bacon, as you know, was an extraordinary man, one of the greatest minds not only of England but of the world. He waited for high office for many years. Finally he got into office, and then did what all the other high dignitaries did; he was no worse, but he got caught at it. As a matter of fact, corruption had become so rife that even James the First said, "My hair stands on edge."

And here is a marvelous bit of history. James proposed to the parliament in which Sir Edward Coke sat, "I will appoint a commission, 10 men from the House of Commons and six men from the House of Lords to investigate Bacon." And they said, "Thank you very much. We have our own investigative powers, and we prefer to go under our own steam in inquiring." Now, what a magnificent historical foundation that is, claimed as long ago as 1621 under the power of the "Grand Inquest of the Nation." Thus the "grand inquest" is found as early as 1621. And the "grand inquest" was equal in importance, as I will show, in the eyes of the English to the legislative function.

Why is all this relevant? Because *McGrain v. Daugherty* decided in 1927 that the investigatory power was regarded as an attribute of the power to legislate in the British Parliament before the American Revolution, and that the constitutional provisions which commit legislative functions to the two Houses are intended to include this attribute. This authorizes us to turn to parliamentary history as to the scope of the power, because Congress has the power that Parliament had.

Now, I want you to remember that when the words "legislative power" were put into the Constitution, they had a content. One of the attributes that makes up the "legislative power" was the power of investigation. Nothing comparable to that history exists with respect to the executive power. No member of the executive branch has ever cited any pre-1787 precedent for the proposition that there was an executive power to withhold information from the legislature.

The power of inquiry was auxiliary to the power of impeachment, on a very sensible ground. You don't hang a man first and then inquire whether there were grounds. First you investigate. And you don't even have to make a determination that we intend to impeach you, and therefore will first investigate, for this is to prejudge the case.

Senator MUSKIE. Mr. Kleindienst said, you don't need facts to impeach, all you need is votes.

Mr. BERGER. I am glad that you reminded me.

I can forgive a busy man for using boilerplate when he never has time to study for himself what the facts are. But I can't forgive that appalling statement, because appalling it is. The notion that you can penalize any man without evidence, without facts—that is what he said—but just by your vote, shows a callous view of power that is frightening. It betrays our basic allegiance to due process of law. For every man, even a Presidential aide, there ought to be some evidence before he is removed from office. But to me this is symptomatic, not of mere arrogance, but of effrontery. If you read the Moorhead hearings as I have, you will find the same effrontery throughout. I marvel that Congress has had the patience to put up with it for 3 years. It is not only the Moorhead hearings, the Moss hearings are replete with bureaucratic contempt for Congress. You don't need more hearings, you need some gumption, if you will permit me to say it.

Now, in performing this inquiry function the House of Commons acted as the "Grand Inquest of the Nation." And we need to bear in mind what Lord Denman, Chief Justice and a great judge, said in 1839: "The Commons . . . are not invested with more of power and dignity by their legislative character than by that which they bear as grand inquest of the Nation."

So when Mr. Kleindienst says to you, that inquiry into the Watergate conspiracy is for the grand jury, not for you, he fails to recognize that you are the super grand jury, that the "Grand Inquest" enjoys powers that no grand jury enjoys and which are rooted almost as deeply as the grand jury system.

Let me reemphasize, sir, that in a random sampling of parliamentary debates at different periods stretching from 1621 to 1742, I found legislative oversight of administration across the board: Inquiries to lay a foundation for legislation, into corruption, the conduct of war, execution of the laws, disbursement of appropriations, in short, into every aspect of executive conduct. Foreign affairs, about which American Presidents have drawn a curtain of secrecy, were not excepted. The great English historian, Henry Hallam, after adverting to the investigations of 1691 and 1694, concluded—

\* \* \* it is hardly worth while to enumerate later instances of exercising a right which had become indisputable, and, even before it rested on the basis of precedent, could not reasonably be denied to those, who might advise (i.e., legislate), remonstrate and impeach.

So in 1694, Hallam said the power of inquiry was a settled power, both on precedent and logic.

The highest officers of the land responded to such inquiries without demur. No hint turned up in my search of the parliamentary records of a challenge by a minister or subordinate to the right of Parliament to inquire or to the scope of inquiry into executive conducts.



If history may serve as a guide, it is a striking fact that no minister—let's remember that they were the Ministers of the Crown—interposed an objection to the right of Parliament to inquire.

Speaking of inquiries——

Senator KENNEDY. On that point, how narrow was the pursuit of the investigation by the members of the Parliament? Did it go only to the particular ministers, or did it go to their aides?

Mr. BERGER. Aides were included, and without the need to seek the permission of a minister to bring an aide in. Parliament brought in anybody that it wanted; it subpoenaed a person and he came; if he didn't, he was clapped in the Tower.

Senator Ervin's readiness to employ this time-honored procedure prompts me to say that if I had six Senator Ervins, old as I am, I would storm the White House.

Speaking of inquiries instituted in 1689 with respect to miscarriages in the conduct of the war in Ireland—this is as if you would be investigating Cambodia or Vietnam—Hallam said, "No courtier, that is, minister, has ever since ventured to deny this general right of inquiry." This corroborates what I found even earlier. Hallam, I repeat, said that from 1689, no one has ever dreamed of denying this general power.

Now, we come to the bridge into American history. Recall that one of the striking things about the colonial assemblies was their temerity in claiming for themselves all the powers of the Parliament. In fact, they aped the Parliament in every ridiculous detail, so if you were in the House of Burgesses in Virginia you would think you were sitting under the towers of London.

There is striking colonial recognition of the power of the "grand inquest" by one of the great men of American constitutional law. James Wilson of Pennsylvania who, with Mr. Madison, was an architect of the Constitution. In 1774 he wrote—they were always studying the English history, the constitutional traditions—he wrote:

The House of Commons have checked the progress of arbitrary power, and have supported with honor to themselves, and with advantage to the nation, the character of the grant inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censure; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults.

Now, we may be sure of one thing, a man who in 1774 revered an institution like this didn't scuttle that love and admiration when he was attempting to set up the legislative branch.

Let me summarize: (1) Parliament enjoyed a plenary power of inquiry into executive conduct; and (2), no Minister or subordinate, and no subject of inquiry was immune from investigation into any aspect of administration. It is a striking fact that neither the Eisenhower nor Nixon administration, where "executive privilege" was been most extravagantly claimed, has advanced a single pre-1787 precedent for executive refusal to turn over information to the legislature. Thus, whereas congressional inquiry, rested by the Supreme Court on the example of Parliament—which had plenary power, has a solid foundation, there is no preconvention historical basis for the claim that the power to withhold information from the legislature was an attribute of the Executive.

That the Founders were aware of this legislative inquiry attribute is demonstrated by four or five references in the convention and the several ratifying conventions to the function of the House as the "grand inquest of the Nation." Time and again there was acknowledgment and appreciation that the House is a "grand inquest." And what that meant to the founders James Wilson told us: the proudest Ministers would tremble at the bar of the House.

And I may state further that although the several conventions adverted to the function of the "grand inquest of the Nation," there isn't a smidgen of evidence that anyone sought in any way to curb it. On what basis can it be argued that there was an intention to curb a recognized power? Some historical facts have to be adduced, and none have been, and I venture to say none can be adduced. One of the things I find very disturbing is that the argument for the Presidency tries to beat something with nothing. There are cases in the courts that say one cannot dismiss evidence unless it is inherently incredible; it can not be overcome by speculation based on no evidence.

Let us talk about the separation of powers, for this is the rock on which the executive branch builds its case. When they invoke the separation of powers they assume the answer; they assume that the separate power of the executive comprehends an attribute which it didn't have at the adoption of the Constitution. They read a novel power to withhold into the executive power. It is no answer to say that the executive power to withhold is just as implied as the congressional power to inquire, because the power of the legislature doesn't rest on mere implication or the necessities of government; it rests on historical precedents.

It is often argued that the executive may not require a Senator or Senate committee to turn over information to the executive branch. Of course not. That was answered in *Anderson v. Dunn*, when it was argued that if Congress has the contempt power so too has the executive. But Justice Johnson replied, not at all; there is no historical precedent for the executive claim, whereas there is historical precedent for the legislative power. So too, there is historical precedent for congressional oversight of the executive, but there is no precedent running the other way.

The case for Congress does not rest on implication, nor on the necessities of government, but is based on parliamentary practice, and upon adoption of that practice by the recognition of the "grand inquest" in the several conventions. There was not the slightest intimation in any of the conventions of intention to diminish that function in any respect. That is the starting point.

Congress may, however, not desire to exercise its power to the full. I share Senator Ervin's idea that certain conversations between the President and, say, Mr. Rogers, you don't want to poke into. You haven't done so; you have shown consideration. But that doesn't raise it to the level of a constitutional right not to respond. It is a matter of grace. And there are other areas. I would certainly want to police McCarthyism, so that you wouldn't have character assassination as a result of your investigation. These again are matters of grace.

But I will return to that.

Senator KENNEDY. Do you call that a matter of grace, or acquiescence, or what?

Mr. BERGER. I would suggest to you that acquiescence does not create power, on this very simple principle. The Court has said time and



again, Congress cannot delegate its power except with standards. We won't let you give delegations as broad as all outdoors. You cannot abdicate your power. I reject the notion that what you cannot delegate and what you cannot abdicate can just be taken by the President willy-nilly. What you can't give to him he cannot take.

What I am saying, as a matter of good government, Mr. Chairman, is it would be desirable for you yourself to set down the sort of things—and it would win the confidence of the American public—that you have no intention of probing into. But to move from an umbrella over communications between Mr. Nixon and Mr. Rogers to all communications on the lower tiers of government between 21½ million employees, is the sheerest folly. There is hardly a thing—and this is what to bear in mind when you are talking about this “candid interchange” doctrine—there is hardly a governmental file that does not contain interoffice communications, reports, and memorandums. Then there are the executive refusals of reports by outsiders, like the report of Sir Robert Thompson about what was going on in Vietnam, paid for by the taxpayers' money, in which the President apparently claimed some sort of proprietary interest. When a committee asked for it, the report was withheld. And the reason emerged in the Pentagon papers, it contained facts which were discreditable to continuance of the war. That is the sort of thing that “candid interchange” leads to.

Let me recur to the separation of powers. I mentioned to you first that the right to withhold wasn't an original portion of Executive power, it was not an attribute of Executive power to resist the power of inquiry.

Second, the arch priest of separation of power was Montesquieu. He was cited time and time again in the various conventions as the oracle on what the separations of powers meant. And looking at the English model, because that was his basis, he said, of course, the legislature must have the power to inquire into the execution of its laws. There you have the apostle of the separation of powers saying it has no application to this legislative attribute of inquiry.

There is a third fact that bears on the separation of powers, the Act of 1789. Let me read that to you. The act made it:

The duty of the Secretary of the Treasury \* \* \* to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or the House of Representatives, or which shall appertain to his office.

Bear in mind, this was drafted by Alexander Hamilton, who was a member of the convention, who defended the Constitution in the New York ratification convention, who was the coauthor of the *Federalist*; it was drafted by him, and adopted by the First Congress, which Charles Warren said was virtually an adjourned session of the convention. The First Congress had some 20 members of the convention sitting in it, and the act was signed by the presiding officer of the convention, President George Washington.

We can't say that they didn't know the score about the separation of powers. When they wrote a statute making it the duty of the Secretary of the Treasury to furnish all information pertaining to his office, we have to assume that they knew what was constitutional; they knew that the separation of powers did not bar the statute.

The act itself has no provision for executive discretion to withhold. It imposes an unqualified duty to deliver information that is re-

quired by Congress. There is nothing in the legislative history of the act that shows there was any intention to give either the Secretary or the President discretion to withhold.

Were the issue in doubt, President Nixon has just supplied the clincher by his instructions to members of his staff to appear before the grand jury that is investigating the Watergate conspiracy. A grand jury is an arm of a separate branch, the judiciary. What is there in the separation of powers that does not prevent information being given to a grand jury—and this isn't a matter of grace, as I will come back in a moment to show—and yet bars the Congress from knowing about it, the "grand inquest of the Nation" which transcends the grand jury? I say to you that he himself has just torpedoed his notion of the separation of the powers.

Of course, we know why he has done it, because he controls the grand jury through his prosecutor. He can't control the Congress. But nevertheless, logically and analytically he has undercut his own reliance on the separation of the powers.

This instruction to appear before a grand jury is not a matter of grace, because, consider, for example, if John Dean were the only man that had seen a murder in the city of Washington, would the fact that he was a member of the Presidential staff shield him from appearing before a grand jury? Of course, it wouldn't. And I may say in this connection, when Mr. Kleindienst says that only the grand jury may investigate the crimes, he forgets the terms of the impeachment provision, which first provides for impeachment and removal from office, and says, in addition, that the removed officer shall be subject to indictment, trial, and conviction. This means that the power of impeachment includes indictable crimes; Congress can inquire into them.

And I want to remind you also—one other thing on the separation of powers——

Senator KENNEDY. Professor, we are going to have to break off in about 10 or 12 minutes.

Do you think you can bring us from the founding days of the Republic up until today in that time? I am sure all of us will examine in detail your statement.

Mr. BERGER. No; I cannot. I hope that you will read my statement because if you know the historical facts that underlie your right to exercise the power of inquiry, you are going to face up with much more conviction and courage to the confrontation that is not to be avoided.

But to talk for a moment about the power of impeachment. Bear in mind, an argument against impeachment is very simple. You need two-thirds votes; for that reason Mr. Kleindienst could tauntingly invite you to use the power of impeachment when he knows you haven't got the votes. But that doesn't mean that it isn't a useful thing to know that it is there in reserve.

Let's bear in mind, the President is impeachable, and the Vice President, in express terms, and every civil officer. And I remind you, that the immediate importance of impeachment is that auxiliary to the power of impeachment is the power to inquire before you impeach. And that goes even to the President. Andy Jackson said that if you feel you have got to investigate the President, why I will welcome it, I will



open all the facilities to you. The impeachment provisions embrace every civil officer without leave by the President. In fact in the First Congress one man after another said, we can tear down any minister of the President against his wishes, if he seeks to maintain a favorite in office, we can remove him. You don't have to ask the permission of the President to launch an inquiry whether a civil officer is guilty of impeachable conduct.

Rather than try inadequately to summarize the remainder of my statement, I just want to turn to one thing which caught my eye. In 1742 the great William Pitt summarized the state of English law. He says:

We are called the Grand Inquest of the nation, and as such as it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing is done amiss.

And you have judicial recognition by a great English judge, Justice Coleridge, who stated in 1845, just again to tie up the scope of English power:

That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit \* \* \* it would be difficult to define any limits by which the subject matter of their inquiry may be bounded \* \* \* they may inquire into everything which concerns the public weal for them to know; and themselves, I think, are entrusted with the determination of what falls within that category.

Having said that, I would adjure you to exercise the same responsibility as the Parliament, keep sense of the high duty that devolves on you; permit no McCarthyism, no character assassination, but by the same token, courageously demand information.

I think it a scandal that Senator Fulbright's committee couldn't get the Pentagon papers. And those of you who have read some of the Pentagon papers know that the reason you didn't get them is because it cast the whole foundation of the war in the gravest doubt.

[The full prepared statement of Mr. Berger follows:]

#### PREPARED STATEMENT OF RAOUL BERGER

It is a privilege to respond to your invitation to speak to the issue of executive privilege. That issue does not constitute a mere jurisdictional squabble between Congress and the President; it goes to the very heart of our democratic system. As Justice Potter Stewart said about the withholding of agency and departmental reports respecting the contemplated underground atomic explosion in Alaska,

"With the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed."

He who controls the flow of information controls our destinies; so much the mounting escalation in Vietnam alone should teach.

In the twenty-odd months that have elapsed since I testified on the subject before the Subcommittee on Separation of Powers, the atmosphere has changed very considerably. Mounting frustration has brought your leadership to realize that the steady drain on your energy and time caused by executive withholding of needed information must not be endlessly protracted. Some of you are prepared to resort to enforcement via a contempt proceeding. As you know the contempt power of Congress has been sustained in suits against private individuals, to mention only *McGrain v. Daugherty*. In June 1971, Assistant Attorney General William H. Rehnquist acknowledged that Congress can cite an officer of the government who refuses to appear or to supply information for contempt, and that an executive officer who has custody of desired documents must<sup>1</sup> respond to a Congressional subpoena. Thus the contempt procedure has judicial sanction, and according to now Justice Rehnquist, it extends to recalcitrant officials.

<sup>1</sup> Hearings before a Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations on the Pentagon Papers, pt. 2, pp. 379, 385 (June 1971) hereafter cited as Moorhead Hearings.

The issuance of a citation for contempt need not be regarded as a punitive measure but rather as a means of opening the door to judicial review. Arrest of a recalcitrant by your Sergeant at Arms enables him to obtain a writ of *habeas corpus* whereby the constitutional issue may be judicially resolved. Happily President Nixon has stated that he would welcome submission of the issue to the courts, and a contempt citation offers a proven and direct route. To proceed in this manner obviates the "political question" issue. When a court is asked to free a man who contends that his detention is unconstitutional, it cannot very well evade the issue and leave him to rot in jail. That course becomes even more dubious when both Congress and the President desire the Court to adjudicate the controversy. Indeed, Madison stated that neither branch can decide a boundary dispute between them. Professor Alexander Bickel expressed a similar view in his testimony during the Hearings on Executive Agreements before the Senate Committee on Foreign Relations, p. 31 (October 1971).

President Nixon's confidence that the Court will sustain his position needs to be measured against the historical facts. With George Ball, former Under Secretary of State, I consider that executive privilege is a "myth", without "constitutional foundation." We need to recur to the facts which riddle the myth because estimable members of your body as well as important molders of public opinion have been influenced by executive propaganda to believe that there is such a constitutional attribute as executive privilege, that Washington, for example, was the first to invoke the doctrine.

In 1965 I published an extensive critique of the view, expressed by then Deputy Attorney General William P. Rogers in a 1958 Memorandum submitted to the Senate, that the President had "uncontrolled discretion" to withhold information from Congress. So far as I can find, no member of the executive branch, past or present, or for that matter, no academician, has attacked my critique in a published writing. For the purpose of expanding my study into a book, I have engaged for the last 20 months in restudying and rethinking the problem, and in considerable additional research, particularly in the English sources and our own constitutional history. I found that Parliament enjoyed an untrammelled power of inquiry into executive conduct, that no Minister or subordinate interposed any objection to the right of Parliament to inquire, and substantial evidence that the Founders meant to adopt this power of the "Grand Inquest of the Nation," without the slightest indication that they intended in any way to cut it down. Against this history, the pseudo-precedents after 1787 carry an all but impossible burden. Permit me to spread some of this history before you.

## I

*McGrain v. Daugherty* offers a good starting point. Decided in 1927, it declared that the investigatory power was "regarded as an *attribute* of the power to legislate in the British Parliament . . . before the American Revolution"; and that "the constitutional provisions which commit the legislative functions to the two houses are intended to include this attribute." To obtain light as to the *scope* of this attribute we may, therefore, turn to parliamentary history.

There I found that the power of inquiry had its inception as an *auxiliary* to the power of impeachment, on the sensible ground that one does not indict before inquiring whether there is cause. This fact is of immense importance because, as you recall, "The President, Vice President and all civil officers" are subject to impeachment, and it follows that they are all subject to preliminary inquiry. Of this, I shall have more to say later.

In performing this inquiry function, the House of Commons acted as the "Grand Inquest of the nation"; and we need to bear in mind, as Chief Justice Lord Denman stated in 1839, that:

"The Commons . . . are not invested with more of power and dignity by their legislative character than by that which they bear as grand inquest of the nation."

In a random sampling of parliamentary debates at different periods, stretching from 1621 to 1742, I found legislative oversight of administration across the board: inquiries to lay a foundation for legislation, into corruption, the conduct of war, execution of the laws, disbursement of appropriations, in short, into every aspect of executive conduct. Foreign affairs, about which American Presidents have drawn a curtain of secrecy, were not excepted. The great English historian, Henry Hallam, after adverting to the investigations of 1691 and 1694, concluded:



"\* \* \* it is hardly worth while to enumerate later instances of exercising a right which had become indisputable, and, even before it rested on the basis of precedent, could not reasonably be denied to those, who might advise (*i.e.*, legislate), remonstrate and impeach."

The highest officers of the land responded to such inquiries without demur. No hint turned up in my search of the parliamentary records of a challenge by a Minister or subordinate to the right of Parliament to inquire or to the scope of inquiry into executive conduct. Speaking of inquiries instituted in 1689 with respect to miscarriages in the conduct of war in North Ireland, Hallam stated, "No courtier (*i.e.*, Minister) has ever since ventured to deny this general right of inquiry." Colonial recognition of these facts is to be found in 1774 by James Wilson, with Madison the leading architect of the Constitution. The House of Commons, he wrote:

"Have checked the progress of arbitrary power, and have supported with honor to themselves, and with advantage to the nation, the character of the grand inquisitors of the realm. The proudest ministers of the proudest monarchs have trembled at their censure; and have appeared at the bar of the house, to give an account of their conduct, and ask pardon for their faults."

From this, two complementary conclusions may be drawn: (1) Parliament enjoyed a plenary power of inquiry into executive conduct; and (2) no Minister or subordinate, no subject of inquiry was immune from investigation into any aspect of administration. It is a striking fact that neither the Eisenhower nor Nixon Administration, where "executive privilege" has been most extravagantly claimed, has advanced a single pre-1787 precedent for executive refusal to turn over information to the legislature. Thus, whereas Congressional inquiry, rested by the Supreme Court on the example of Parliament—which had plenary power, has a solid foundation, there is *no pre-Constitution historical basis* for the claim that the power to withhold information from the legislature was an *attribute of the executive*. All inferences are to the contrary. This, as I shall show, has important implication for the executive appeal to the separation of powers.

That the Founders were aware of this legislative-inquiry attribute is demonstrated by four or five references in the Convention and the several Ratifying Conventions to the function of the House as the "grand inquest of the nation." Wilson's 1774 publication, earlier quoted, exhibits a thorough appreciation of what that function embraced, above all that "the proudest Ministers \* \* \* appeared." It calls for solid evidence that Wilson abandoned his admiration for this practice of the Commons, particularly since he viewed the executive power merely as a power to execute the laws. In fact, there is not the slightest intimation in the records of the several Conventions that the Founders intended to curb the functions of the Grand Inquest in any way.

The executive branch builds its case on the separation of powers. But resort to the separation of powers assumes the answer; it assumes that the executive had a withholding power upon which legislative inquiry encroaches. John Adams spelled out in the 1780 Massachusetts Constitution that the separation of powers was designed to prevent one department from exercising the powers of another. Since *it was not an attribute of executive power* at the adoption of the Constitution to refuse information to the legislature, a congressional requirement of information from the executive does not encroach on powers confided to the President; it does not violate the separation of powers. This is confirmed by a statement of Montesquieu, who was repeatedly cited by the Founders as the oracle of the separation of powers. The legislature, he said—exhibiting his familiarity with the English practice—should "have the means of examining in what manner its laws have been executed by the public officials." Given repeated recognition of the function of the House as Grand Inquest, something more than appeals to an abstract separation of powers is required to curtail the function. Unless evidence is inherently incredible, the courts hold, it is not to be defeated by speculation based on no evidence.

The fact that the separation of powers was not designed to reduce the "Grand Inquest" function is again confirmed by the Act of 1789, which made it—

"The duty of the Secretary of the Treasury \* \* \* to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or the House of Representatives, or which shall appertain to his office."

The Act contains no provision for executive discretion to withhold information, and there is no reference whatsoever to such discretion in the legislative history

of the Act. This provision was drafted by Alexander Hamilton who, as a member of the Convention and coauthor of *The Federalist*, knew well enough whether a duty could be imposed on the executive branch to furnish information to Congress. Adopted by the First Congress, whose construction of the Constitution is given great weight, and signed by President Washington, who had been presiding officer of the Convention, this Act can hardly be deemed in violation of the separation of powers.

Were the issue in doubt, President Nixon has just supplied the clincher by his instruction to members of his staff to appear before the grand jury that is investigating the Watergate conspiracy. He is scarcely consistent: the separation of powers does not bar inquiry by the judiciary, one coordinate branch, while it does bar inquiry by another, the Congress. Yet it is the legislature, acting as the Grand Inquest, which is the highest grand jury in the land. And why does disclosure to the grand jury of confidential communications between members of the White House staff not "inhibit" the candor allegedly essential to performance of executive functions, whereas disclosure to Congress, according to President Nixon, would "weaken and compromise" the "candor with which such advice is rendered?"

Lest it be thought that the President's instruction to appear before the grand jury was a matter of grace, I submit that no man is immune from testifying before the grand jury as to the commission of a crime. If a member of the White House staff, for example, were the sole witness to a murder, he could scarcely refuse to testify on the ground of executive privilege. That the separation of powers interposes no obstacle to the judiciary is immediately apparent from two cases. In 1953, the Supreme Court held in *United States v. Reynolds* that the decision whether military secrets may be withheld from a party in litigation cannot be left to the caprice of an administrator but is for the determination of the courts. Much earlier Chief Justice Marshall held on the *Trial of Aaron Burr* that President Jefferson could be required to furnish to a defendant in a criminal trial a letter to Jefferson from General James Wilkinson. Marshall, who had been a vigorous advocate of the Constitution in the Virginia Ratification Convention was hardly unaware that his ruling was not barred by the separation of powers: nor can it be presumed that in 1953 the Supreme Court was oblivious to that problem. If judicial insistence on executive disclosure does not offend against the separation of powers, Congress, too, is not barred.

Let us now return to inquiry as a prelude to impeachment, bearing in mind that the Constitution makes express provision for impeachment of "The President, Vice President and all civil officers." James Iredell, later a Justice of the Supreme Court, adverted in the North Carolina Convention to the maxim that the King can do no wrong, and exulted in the "happier" provision which made the President himself triable. The President, it should not be forgotten, was not looked at with awe but with apprehension. Of this power of impeachment, a Committee of the House, faithfully reflecting parliamentary history, stated in 1843 that:

"The President himself, in the discharge of his most independent functions, is subject to the exercise of this power—a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent."

Since the Constitution expressly provides for impeachment of the President, since historically inquiry may precede impeachment, President Nixon errs in asserting that "the manner in which the President exercises his assigned executive powers is not subject to questioning by another branch of the Government." Even the headstrong Andrew Jackson acknowledged that:

"Cases may occur in the course of (Congress) proceedings in which it may be indispensable to the proper exercise of its power that it should inquire or decide upon the conduct of the President or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Consequently, Mr. Nixon's argument that "If the President is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned for their roles are in effect an extension of the President" falls to the ground. Moreover, since "all civil officers" are impeachable by the terms of the Constitution, they are subject to inquiry without the leave of the President. Impeachment, said Elias Boudinot in the First Congress—that almost "adjourned session" of the Constitutional Convention, enables the House "to pull down an improper officer, although he should be supported by all the power of



the Executive." The point was made again and again, among others, by Abraham Baldwin, a Framers. English history affords no instance where Parliament was required to seek leave of a Minister for the appearance of a subordinate; and the imposition of such a condition by the President has no historical warrant.

My search of the several Convention records, let me repeat, turned up not a shred of evidence that the President was empowered to withhold *any* information from the Congress. One constitutional provision, in fact, speaks against it. The Framers authorized secrecy in only one case, and then by Congress, not the President. Congress is required to keep and publish Journals except "such part as may in their (each House's) judgment require secrecy." This provision encountered rough going, being harshly criticized by James Wilson, George Mason, Elbridge Gerry, Patrick Henry and also by Jefferson. To allay fears of this secrecy provision, proponents explained that it had very restricted scope. So, John Marshall stated in Virginia that the debates "on the propriety of declaring war" and the like, could not be conducted "in the open fields," and said, "In this plan, secrecy is *only to be used* when it would be fatal and pernicious to publish the schemes of government."

In light of the denial of limitless power to conceal to the "legislative authority"—which Madison said "necessarily predominates" in "republican government"—how can an intention be derived of an *implied* grant to the executive of power to keep anything and everything secret? Rather, as the Supreme Court held in analogous circumstances, the express authorization for limited discretionary secrecy by Congress and the omission to make similar provision for the President indicates an intention to withhold such authority from him. What might momentarily be concealed from the public by Congress had to be divulged by the President to Congress, if that senior partner in government was to participate in making the momentous decisions which alone were to be kept secret. Marshall's limitation of the express secrecy provision to "fatal and pernicious" publications renders laughable the wholesale executive claim to secrecy for communications between several million subordinates in the executive department.

## II

Before I examine the pseudo-"precedents" on which administration spokesmen base their claim of executive privilege, it should be noted that there is a long line of Congressional precedents, solidly based on the investigatory power of Parliament and unequivocally asserted in plenary terms.

President Nixon tells us that executive privilege "was first invoked by Washington." Preliminarily, the first use of the phrase, so far as I could find, occurred in a private litigation in 1958. An independent search by Professor Arthur Schlesinger likewise turned up no use of the phrase prior to the Eisenhower Administration, scarcely testimony of a well-established doctrine. There were two incidents. First, there was the 1792 inquiry into the disastrous St. Clair expedition against the Indians; Washington turned over all the documents; "not even the ugliest line in the flight of the beaten troops was eliminated," states his biographer, Douglas Freeman.

Executive reliance on St. Clair is based, *not on refusal*, of the documents, but on Jefferson's notes of a Cabinet meeting at which it was agreed that the "house was a grand inquest, therefore might institute inquiries," but that the President had discretion to refuse papers "the disclosure of which would injure the public." These notes are not reconcilable with the 1789 Act which Washington had earlier signed, and which permitted unqualified inquiry. What little prece-dential value may attach to the notes vanishes when it is considered that only four years later Washington himself did not think to invoke the St. Clair "precedent" in the Jay Treaty case upon which the Executive next relies, and instead stated his readiness to supply information to which ever House had a "right", such as the Senate had to treaty documents.

Jefferson's notes did not find their way into the government files; there is no evidence that the meditations of the Cabinet were ever disclosed to Congress. Indeed, it would have been most impolitic and unsettling to excite the House by a claim of discretion to withhold when all the required information was, in fact, turned over. The notes were found among Jefferson's papers after his death and published many years later, under his "Anas," what he described as "loose scraps" and "unofficial notes." There this "precedent" slumbered until it was exhumed by Mr. Rogers in 1957. Some precedent!

Time does not permit me to show that Jefferson, who unlike Rogers, turned to English precedents for the scope of the executive power, was mistaken in his reading of some remarks in the Walpole proceedings of 1742. It must suffice to say that William Pitt more accurately reflected the state of English law in those proceedings:

"We are called the Grand Inquest of the nation, and as such it is our duty to inquire into every step of public management, either abroad or at home, in order to see that nothing is done amiss."

And so it remained, as Justice Coleridge stated in 1845:

"That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit \* \* \* it would be difficult to define any limits by which the subject matter of their inquiry may be bounded \* \* \* they may inquire into everything which concerns the public weal for them to know; and themselves, I think, are entrusted with the determination of what falls within that category."

The second Washington "precedent" is his refusal to turn over the Jay Treaty papers to the House. He had *delivered* them to the Senate but refused them to the House because, he said, the House had no part in treaty-making and hence no "right" to the papers. He emphasized, however, that he had no disposition to withhold "any information \* \* \* which could be requested of him as a right," a repudiation of Jefferson's "discretion to withhold."

And as an example of a "right" to require documents (which explains his delivery to his partner in treaty-making, the Senate) he instanced impeachment; but stated that "It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives except that of impeachment; which the resolution has not expressed." This put the cart before the horse; it required the House to prejudge the case, to "purpose" impeachment before it inquired whether there was just cause. Then, too, the procedure required for impeachment was left to the House, for to it was given "the sole power of impeachment," so that Washington invaded the House's prerogative in suggesting a decision to impeach must precede inquiry. Nonetheless, here Washington recognized what parliamentary practice teaches, that inquiry was auxiliary to impeachment and could even reach an ambassador plenipotentiary, Chief Justice Jay.

A Washington precedent that sheds more light on President Nixon's invocation of executive privilege to shield his counsel, John Dean, from inquiry as to his knowledge of, or participation in the "Watergate" conspiracy, is the Hamilton incident. When Washington learned that an investigation into the conduct of his "intimate adviser," Alexander Hamilton, his Secretary of the Treasury, was rumored, Washington stated:

"No one . . . wishes more devoutly than I do that (the allegations) may be probed to the bottom, be the result what it may."

Washington would have welcomed, not thwarted, the interrogation of Mr. Dean.

Following Washington's example, President Polk stated in 1846:

"If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office \* \* \* and should think proper to institute an inquiry into the matter, all the archives and papers of the Executive Department, public or private, would be subject to the inspection and control of a committee of their body, and every facility in the power of the Executive be afforded them to prosecute the investigation."

This, it will be recalled, was also the view of President Jackson.

It would be stale and unprofitable to rehearse subsequent presidential assertions of a right to withhold information from Congress, for the last precedent stands no better than the first. Bare assertion, even if oft-repeated, can no more create power than the President can lift himself by his bootstraps. As the Supreme Court stated in the *Steel Seizure Case*, "That an unconstitutional action has been taken before surely does not render the same action any less unconstitutional at a later date."

Let us rather focus on that branch of executive privilege which, according to President Nixon, was "designed to protect communications within the executive branch" and is allegedly "rooted in the Constitution." When Assistant Attorney General William H. Rehnquist appeared before Congress in 1971, the instances he cited for the refusal of the President's "intimate advisers to appear" went back no farther than the Truman Administration. These refusals, said he, were based on the principle that the advisers "ought not to be interrogated as to conversa-



tions \* \* \* with the President." Be it assumed that communications between the President and members of his Cabinet enjoy constitutional shelter—by no means an incontrovertible assumption—and that still does not stretch to communications between several million subordinate employees.

What the President conceives to be "rooted in the Constitution" is in fact *first met in 1954*, when President Eisenhower sought to ward off Senator McCarthy's savage attacks on Army personnel by a directive that communications between employees of the Executive branch must be withheld from Congress so that they may "be completely candid in advising with each other." Overnight this "doctrine" was expanded to shelter mismanagement, conflicts of interest such as led the Supreme Court to set aside the Dixon-Yates contract, inexplicable selection of low bidders, etc., etc. A detailed account of the rank, jungle-like growth of the "candid interchange" doctrine in the Eisenhower years is to be found in Clark Mollenhof, *Washington Cover-Up*.

It is strange doctrine that the acknowledged power to probe "corruption, inefficiency and waste" does not extend to "candid communications" which are often at the core of such misconduct. Had that doctrine prevailed, many an investigation of corruption and maladministration, *e.g.*, Teapot Dome, would have been stopped in its tracks. Congress, declared the Supreme Court in *McGrain v. Daugherty*, may investigate "the administration of the Department of Justice \* \* \*" and particularly the Attorney General and his assistants." To shield communications between suspected malefactors from such inquiry would go far to abort investigation.

As a Congressman in 1954, President Nixon protested against Truman's instruction to withhold an FBI letter, saying, "That would mean that the President could have arbitrarily issued an Executive order in the (Bennet) Myers case, the Teapot Dome case \* \* \* denying the Congress \* \* \* information it needed to conduct an investigation of the executive department."

Eisenhower's claim that "candid interchange" among subordinates is an indispensable condition of good government is an unproven assumption. It is disproved by the fact that his withholding on that ground of information respecting alleged maladministration or foreign aid in Peru was immediately countermanded by President Kennedy, with the salutary result that exposure led to correction, not to the toppling of administrative towers. Both the Kennedy and Johnson Administrations sharply whittled down claims of executive privilege with no noticeable ill effects on administration.

In England, "candid interchange" was laughed out of court by the House of Lords in *Conway v. Brimmer* (1968). Against the debatable assumption that fear of disclosure may inhibit "candid interchange," there is the proven fact that such interchanges have time and again served as a vehicle of corruption and malversation, so that, to borrow from Lord Morris, "a greater measure of prejudice to the public interest would result from their non-production." Can the costs of suppressing the Pentagon Papers be weighed in the scales with preservation of confidences between subordinates? Disclosure to Congress and the people of reports about the untrustworthiness of and lack of internal support for a succession of Saigon satraps, of bleak intelligence estimates, of growing pessimism in the inner circle about the outcome of the Vietnam involvement, might have enabled Congress to weigh the mountainous costs against the increasingly doubtful benefits of the accelerating escalation.

The issue posed by President Nixon's claim for immunity for Messrs. Henry Kissinger, Peter Flanigan, and John Dean on the basis of mere membership in the White House staff calls for comment.

You will recall that Assistant Attorney General Rehnquist went no further than to say that the "intimate advisers" of the President "ought not to be interrogated as to conversations . . . with the President." On practical grounds, it may be desirable to shield such conversations from Congressional inquiry, and Congress itself generally has not insisted on their disclosure. But it does not follow that there is a constitutional basis for the withholding claim. Indeed, Mr. Dean himself wrote on April 20, 1972, that:

"The precedents indicate that no recent President has ever claimed a 'blanket immunity' that would prevent his assistants from testifying before the Congress on any subject."

Such a claim would be without historical foundation.

"Pernicious advice" to the King by his Ministers was a repeated cause for impeachment; and Francis Corbin in the Virginia Convention, Henry Pendleton in the South Carolina Convention, and James Iredell in the North Carolina Con-

vention, alluded to such "advice" as within the scope of impeachment. Given impeachable "advice", inquiry whether it was communicated cannot be barred on constitutional grounds, whatever may be the merits of the practical arguments for confidentiality. Practical desiderata cannot be converted into constitutional dogma.

In a dictum in *Marbury v. Madison*, Chief Justice Marshall stated that if anything was communicated to the Attorney General in confidence by the President, "he was not bound to disclose it." Sitting on the *Trial of Aaron Burr*, Marshall confined that dictum, as deputy Attorney General Rogers stated, to non-disclosure of "communications from the President," and held that Burr was entitled to have a letter to President Jefferson from General James Wilkinson, obliquely confirming the right of inquiry into "advice".

It needs to be emphasized that the *Marbury* dictum is altogether irrelevant to Congressional inquiry. That was a suit by a private individual, and Marshall stated that the "province of the court . . . is not to inquire how the executive or executive officers perform their duties." Precisely that function, however, does lie within the province of the legislature, as parliamentary history makes clear, as Montesquieu and James Wilson perceived, and as the Supreme Court has repeatedly recognized. In sum, there is no historical warrant for the claim that confidential advice to the President is shielded from Congressional inquiry by the Constitution, though Congress may choose, as a matter of comity, not to probe into such advice.

Information is the blood stream of democracy; he who controls it controls our destinies, as the progressive escalation in Vietnam alone should teach. I cannot improve on President Nixon's 1972 statement:

"When information which properly belongs to the people is systematically withheld by those in power (*e.g.*, the facts behind the Vietnam escalation), the people soon become ignorant of their own affairs, distrustful of those who manage them and eventually incapable of determining their own destinies."

The people, therefore, have an immediate stake in opening all channels of information to Congress, the great American forum of national debate.

### III

#### *The Proposed Bills*

##### (1) S. 858

My prime difficulty with S. 858 is that expressed by Congressman John E. Moss about the predecessor bill:

"We should not recognize executive privilege in any statute. I don't think there is any constitutional basis for executive privilege \* \* \* By recognizing executive privilege here we are going to walk into a trap."

Hearings on executive privilege before the Subcommittee on Separation of Powers, Pp. 332-333 (1971). Similar views were expressed by Robert F. Keller, Deputy Comptroller General, and Professor Norman Dorsen, *id.*, at 304, 310, 364-365. The bill adds nothing to the existing sheaf of Congressional powers. If an official declines to testify, Congress may issue a subpoena; upon the non-compliance with the subpoena a contempt citation can be used for enforcement.

The deference expressed in § 306(b) to a claim of privilege by the President means that in virtually every instance he will rubber-stamp his approval of withholding, as he did in 1971.

If there is a constitutional basis for executive privilege, § 306(c) invades a presidential prerogative by seeking to decide the scope of the privilege. That function would be for the courts. Again, the provision that the Committee "will determine whether the assertion of executive privilege is well taken" constitutes implicit recognition of a doctrine of indeterminate scope.

A fund-cut-off provision such as § 307(f) may well prove ineffectual. In 1960, the Porter Hardy House Committee sought information about rumored maladministration of foreign aid in Peru, which proved true in the event. Congress enacted a cut-off after Presidential refusal to furnish information on ground of executive privilege. Thereupon, Attorney General Rogers rendered an opinion to Eisenhower that he could disregard such cut-offs on the ground that they imposed an unconstitutional condition on disbursement of an appropriation. Eisenhower then ordered the Secretary of the Treasury to disregard the cut-offs and to disburse the funds, any funds, to Foreign Aid. The incident is described with accompanying documents in Clark Mollenhof, *Washington Cover-Up*. In a word, a cut-off may be defied, and this would require submission of the issue to the courts. The provision, therefore, defers an inescapable confrontation.



(2) *Joint Res. 72*

My difficulties with S. 858 are duplicated by S.J. Res. 72. Line 2 of P. 2 also legitimates and provides for a claim of executive privilege by the President. On my view that executive privilege is a constitutional myth, the provision for a hearing on whether the President's claim is well-founded is gratuitous. If, on the other hand, it is indeed "rooted in the Constitution," it is for the courts, not the Congress, to determine its limits. And in any event, I suggest that a Committee would be well-advised to determine *before* the matter gets escalated whether it has a legitimate claim for information.

Existing law provides that a witness who declines to appear, be the cause what it may, can be served with a subpoena; if the recalcitrant persists in his declination, the Committee may submit the case to the Senate, so that again, § 2 is superfluous.

(3) *S. 1142*

The amendments to the Freedom of Information Act are badly needed if only to overcome interminable bureaucratic stallings. Then, too, the decision in the Patsy Mink case made necessary express provision to empower the courts to have the last word as to whether the information sought to be withheld under the exemptions for matters of national defense or foreign policy and for intra- and inter-agency communications (§ 552(b)(1) and (5)) may be withheld. As you know, such is the bureaucratic addition to secrecy that any permission to withhold becomes a blank check that is greatly overdrawn. In the parallel discovery practice of the courts, the courts are the final arbiter as to the right of the executive to withhold information from a litigant. I cannot believe that a judge is less to be trusted with a determination of what must be kept secret than a bureaucrat.

Let me also call your attention to the need to disavow an incautious statement contained in both the Senate and House reports on the FOIA. The Committees permitted the agencies to sell them a bill of goods and incorporated a statement that the disclosure of "candid interchanges" would inhibit free and frank discussion among officials of the executive branch. That statement has been seized upon by the courts, even in private litigation; and in due course it must paralyze efforts to obtain information. You know at first hand how crippling this "candid interchange" claim has been in the field of executive privilege. I would, therefore, urge that the reports on the proposed amendment state that the prior "candid interchange" statements were made in deference to agency opinion, and that experience has demonstrated that they were mistaken and are now specifically repudiated. Let me emphasize, if disclosure to the public would inhibit "candid interchange" in the executive branch, by parity of reasoning, disclosure to Congress would have the same effect. You have furnished ammunition to the opposition.

Above all, matters of discovery in the courts, of FOIA, of executive privilege are interrelated and cannot be considered in isolation. The bureaucratic infatuation with secrecy pervades all three.

Mr. BERGER. Now, I hold myself open for your questions, because that always illuminates things.

Senator KENNEDY. On this point that you are talking about, the balance between reserving technical things and things that the Congress has a right to know, what are the safeguards that you are putting in there?

Is it just the restraint of the Congress concerning the type of information that is required?

Mr. BERGER. I would suggest to you, Mr. Chairman, that that should be codified, because it will win you a great deal of respect, and not as a question of lack of constitutional power to go that far, but just as a matter of decency and good judgment. And I may say, where somebody is vilified, today the courts are also opened under the right to privacy. But if you blast a man to perdition and then he goes into a court and gets vindication 2 years later—

Senator KENNEDY. Have you published anything along those lines, Professor?

Mr. BERGER. I haven't really worked on that in detail, but I would be pleased to——

Senator KENNEDY. Would you work with this group here in attempting to develop some legislation?

Mr. BERGER. I could mention for the record three things. I think one is respecting, as you have respected in the past, the conversations between the President and General Bradley, for instance.

I would also seek to avoid the dissemination of raw files. You should have a mechanism within the Senate so that nothing is disseminated that contains that sort of material.

And I would say that you ought to employ your senatorial powers to censure a Senator who breaks your rules. You only will gain respect for your function if you conduct it in a respectable fashion.

I want to say one thing before I close.

This whole pernicious doctrine of candid interchange—and I have to differ with my esteemed colleagues—the notion that disclosure will inhibit advice on all the tiers, I don't mind the close confidence of the highest levels, but when you extend it to the portions that are being filtered up between three or four or five levels, that troubles me. I want to say first, it is a nonproven assumption disproved by the fact that a great deal of information is in fact turned over; the bulk of it Kleindienst claims is turned over. A lot of that contains confidential communications so the communicators are not inhibited. Kennedy, the moment he took office, turned over the very "candid interchange" that Eisenhower had refused under the opinion of Attorney General Rogers.

And the House of Lords in 1968 laughed the whole doctrine out of court—they said anybody of ordinary fortitude must be expected to render an opinion without fear of future disclosure—doctors, lawyers, others do it all the time. In antitrust files there are lawyer's opinions, which may prove embarrassing when disclosed. And this candid interchange, by the way, is of very recent vintage, 1954; it hasn't got a single precedent in American history for it, let alone English history. And don't sanctify it.

Senator KENNEDY. Senator Muskie?

Senator MUSKIE. Professor Berger, I think that one point that is implicit in what you said to us is that although we have a tripartite government of three branches, that the most fundamental of the powers involved is the power to make the laws. It is that power that the people began to carve out from the powers of the king going back to King John. The most fundamental of these powers is the power to make the law. The courts have the power to apply them, the executive has the power to execute them, but only the Congress has the power to make them. And surely, as an attribute of this most fundamental of the powers, there must be the power to inquire, and that is what Mr. Kleindienst simply doesn't understand.

Mr. BERGER. May I elaborate on what you have just said.

The constitutional distribution of powers tells that in most eloquent terms. For example, all the war powers that the Founders gave to the President are given by three little words: Commander-in-Chief. And that merely means the power of a "first general," as Hamilton said. All the rest were given to the Congress. Time and again you see the tremendous galaxy of powers conferred in Congress, not the President.



The power of the President was deemed largely a power to execute the laws. And then the Framers stepped outside the President's powers and gave him the Commander in Chief power, plus the right to receive ambassadors, and to appoint ambassadors with the consent of the Senate, the very smallest powers. And finally, Madison said, in a republican form of government the legislature necessarily predominates. You are the senior partner. Yet time and again you have a fellow like Secretary Laird telling you, "I don't think it is in the national interest for you to have the Pentagon papers." He treats you like an office boy. And you will be treated that way until you get up on your hind legs and kick him in the slats.

Senator MUSKIE. We need to get another Magna Carta.

Mr. BERGER. No; you have it. When I say that, I am not oblivious to the tremendous pressures on Congress. Nevertheless, there is a mounting tide. And thank God Senator Ervin is grabbing hold of what I think is the best case you have had in years. I think if there is ever a case that will stink in the nostrils of the court, it is the attempt to shield Dean from further inquiry. Pursue it.

Senator MUSKIE. We are glad to get that perspective this morning.

Mr. Chairman, yesterday Mr. Berger, who has enlightened us all, offered to debate in public with Senator Goldwater's counsel, or any advocate of his choosing, the subject of the legal flaws of the Attorney General's 1958 memorandum on executive privilege I would hope that the challenge is accepted.

And I would like to ask that there be included in the record Mr. Berger's letter to the Washington Post yesterday in which he laid down that challenge, so that we may have it.

[The exchange of letters referred to follows:]

[Letter from the Washington Post, Apr. 5, 1973]

#### EXECUTIVE PRIVILEGE

George Lardner's article on executive privilege (March 25), citing Professor Raoul Berger's articles on the subject, demands a response. Lardner and Berger label a 1958 memo by then Attorney General Rogers as being loaded with "the most amazing contradictions and inconsistencies." This attribution would more fittingly apply to the Lardner-Berger writings.

For example, among the so-called contradictions in the Rogers' memo is a reference to a 1789 law making it the duty of the Secretary of the Treasury to give information to Congress. This is said to conflict with the memo's assertion that Congress cannot compel heads of departments to give up papers and information. But there is no inconsistency here because the 1789 law has never been considered as imposing a requirement on the Secretary. Rather, as Berger himself testified at a Senate hearing, with this act the first Congress was "concerned with warding off Hamilton's officiousness." Berger explained, "The provision for a call for information was merely designed to bar Hamilton's unsought intrusions." The provision was drafted by Hamilton who hoped he could impose his advice on Congress at will.

As to the issuance of a subpoena to President Jefferson during the Burr treason trial, it is amazing that Lardner and Berger would cite a case concerning the production of evidence to a private party in a judicial proceeding as authority for compelling executive officers to testify in the supercharged political arena of a congressional hearing. In judicial litigation to which the government is a party, the government is never required to make disclosure. It can drop the prosecution of a suit or settle the case. The Rogers memo correctly rejects the Burr case as unrelated to congressional inquiries.

Nor has President Nixon asserted any "blanket immunity" for he has expressly stated his policy of invoking the privilege only "on a case-by-case basis." The truth is Lardner did not quote Berger's most illuminating statement, which is his admission that "over the years the vast bulk of congressional requests for information have met with compliance . . ."

J. TERRY EMERSON,  
Counsel to Senator Barry Goldwater.

WASHINGTON.

[Letter from the Washington Post, Apr. 12, 1973]

INTERPRETING EXECUTIVE PRIVILEGE: THE CASE AGAINST THE  
"ROGERS MEMORANDUM"<sup>1</sup>

J. Terry Emerson, counsel to Senator Barry Goldwater, would refute (Letters, April 5) my charge that Attorney General Rogers' 1958 memorandum on executive privilege is loaded with "most amazing contradictions and inconsistencies." That charge, he opines, is "more fittingly applied" to my critique. For example, Rogers' reference to a "1789 law making it the duty of the Secretary of the Treasury to give information to Congress cannot compel heads of departments to give up papers and information." The contradiction is self evident; on the one hand, said Rogers, Congress *did* impose a duty by the 1789 Act to give information to Congress; on the other hand, he said, Congress cannot compel the department heads to give it. Drafted by Alexander Hamilton, enacted by the First Congress, and signed by President Washington, the act can scarcely be called unconstitutional.

Mr. Emerson would explain the contradiction away by arguing that "there is no inconsistency here because the 1799 law *has never been considered as imposing* a requirement on the Secretary." (italics added). But Mr. Rogers himself read the Act to impose such a requirement, "a duty." Then too, the statute speaks for itself:

"It shall be the duty of the Secretary of the Treasury . . . [to] give information to either house of the legislature . . . respecting all matters . . . which pertain to his office.

With Nixonian aplomb Mr. Emerson reads the statute right out of the statute books: "it has never been considered as imposing a requirement on the Secretary." A clear statutory mandate is not so easily dispatched. Moreover, in 1854, Attorney General Caleb Cushing advised the President that:

"By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired . . ."

It does not explain away Rogers' internal contradictions to argue that the Act was "concerned with warding off Hamilton's officiousness." Whatever the origin of the Act, both Rogers and Cushing stated that it does impose a duty, a statement then contradicted by Rogers.

"Nor has President Nixon asserted any 'blanket immunity,'" states Mr. Emerson. Mr. Nixon's March 12 statement that it is "appropriate that members of his staff not be so questioned," constitutes a claim of "blanket immunity" for his staff, a claim denied by John Dean himself on April 20, 1972: no President has "ever asserted a claim that presidential aides have blanket immunity from testifying before Congress on any subject." (Washington Post, March 26, p. A-23.)

But enough; it would tax the patience of your readers and needlessly consume space to dwell on other equally untenable Emerson strictures. Let me rather take refuge in Justice Jackson's rule of thumb:

"If the first decision cited does not support it [the proposition] I conclude that the lawyer has a blunderbuss mind and rely on him no further."

Nevertheless, deficient as Mr. Emerson's defense of the Rogers memorandum is, it is yet, so far as I can find, the first published criticism of my 1965 refutation of Rogers. In the intervening 8 years no member of the executive branch, past or present, has undertaken to break a lance with me. The presidential claim of power to dole out to Congress such information as *he* concludes it may see, goes to the heart of our democratic system. And so, old as I am, if Mr. Emerson's

<sup>1</sup> The writer is Charles Warren Senior Fellow at the Harvard Law School and author of a number of works on executive privilege.



client, Senator Goldwater, will supply a forum. I shall be pleased to come to Washington to debate with Mr. Emerson, or with whomsoever Senator Goldwater designates, the proposition:

"Resolved: The Rogers memorandum is a shoddy piece of legal analysis, vulnerable at every joint."

If it can be demonstrated that the Rogers memorandum, which has become the bible of the executive department, is badly flawed, the case for executive privilege crumbles.

RAOUL BERGER.

CONCORD, MASS.

Mr. BERGER. Senator, would you recommend to Senator Goldwater to nominate Mr. Kleindienst?

Senator MUSKIE. I am afraid you would have easy prey there.

Thank you very much.

Senator ERVIN. If I may, I would observe that the afternoon press indicated that Senator Goldwater made a very forthright statement in which he, in effect, stated that if the President exercises the wisdom which he should exercise under the circumstances, he would send down from the White House aides to testify before the select committee.

Senator MUSKIE. You see, you have educational influence, Mr. Berger.

Mr. BERGER. I am confident that if every Member of the Congress shared your knowledge and views, you in this little group, we would be home. And the reason I come down time after time is in the hope of helping to educate the rest of the Members of Congress who haven't had access to the information you have had.

Senator MUSKIE. We appreciate it.

Senator ERVIN. And I would take the liberty of suggesting to any member of the committee the wisdom of reading the wonderful law review article which Professor Berger wrote and which is embodied with his testimony in the hearings of March 1971, before the Subcommittee on the Separation of Powers.

Senator MUSKIE. Let's make it a part of the record.

Senator KENNEDY. It may be included also here as part of the record.

[See "Executive Privilege v. Congressional Inquiry." Appendix, Volume III of these hearings, Executive Privilege, Part 1, Law Review Articles and Statements of Legal Scholars.]

Senator KENNEDY. Thank you very much. You have been enormously helpful.

The subcommittee is in recess.

[Whereupon, at 1:15 p.m., the subcommittee recessed.]





# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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TUESDAY, MAY 8, 1973

U.S. SENATE. SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; AND SUBCOMMITTEE ON ADMINIS-  
TRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE  
JUDICIARY,

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 3302, Dirksen Senate Office Building, Senator Edmund S. Muskie, presiding.

Present: Senators Muskie, Roth, and Thurmond.

Also present: Alfred Friendly, Jr., counsel; Lucinda T. Dennis, chief clerk; and Dorothy J. Kornegay, secretary; Subcommittee on Intergovernmental Relations.

Senator MUSKIE. For the purpose of setting the context of today's hearing as well as to respond to one or two recent developments, I have a brief statement that I would like to read.

## OPENING STATEMENT OF SENATOR MUSKIE

Today our subcommittees extend their inquiry on executive privilege into the area of routine executive secrecy—the practical, day-to-day application of the Government's claimed right to define what information will be withheld from the Congress and the public.

The subject is a complex and delicate one, and until recently, the Congress has chosen to defer to the executive branch for guidance. Consequently, the formal system of classifying information for protection against unauthorized disclosure has developed over 20 years as an exclusively executive prerogative. Classification has been an area where congressional inaction has implicitly sanctioned practices which do not have statutory authorization.

But the result of congressional inaction has clearly been harmful. Information has been hidden from public scrutiny by bureaucratic reflex—sometimes to conceal material that could embarrass officials, sometimes to still dissenting views, and sometimes because secrecy was the path of least resistance.

Subjected only to occasional prodding from congressional committees or to ridicule in the press, those who administer the classification process have become the only ones responsible for revising it. But reform must not be entrusted to those whose interests are served by

the existing system—rather, the task of reform should now fall to the Congress. These hearings begin our examination of ways to reverse the spread of governmental secrecy and to restore public trust in a system that has become untrustworthy in the public mind.

As we begin this effort to clear the air I would like to state my own objections to the latest White House statement on executive privilege—the guidelines issued last Thursday, May 3.

The new guidelines on executive privilege claim that Presidential staff members can deny information to the FBI or the grand jury—without further, explicit, Presidential directive—if that information touches on communication with the President, discussions about such communication, or Presidential papers.

No exception is granted with regard to allegations of criminal conduct. In this sense, the new guidelines appear to be more sweeping than the position stated by the former Attorney General, Mr. Kleindienst, before our subcommittee on April 10. In his prepared statement Mr. Kleindienst indicated that the President's right to withhold such intimate matters ended at the threshold of the judicial system, when an inquiry into criminal conduct was involved. He said "For crime there can be no haven, and the White House has stated that even the President's close personal aides will respond to grand jury inquiry."

Allegations of criminal conduct are precisely at issue now. The newest White House guidelines go beyond the Attorney General's statement and force us to wonder whether, after all, a haven is being built for certain crimes.

Moreover, the guidelines of May 3 also claim that—

Witnesses are restricted from testifying as to matters relating to national security not by executive privilege but by laws prohibiting the disclosure of classified information.

In the present circumstances that reference to statutory protection for classified information is the most self-serving sort of misstatement.

There are, in fact, only two laws that specifically prohibit disclosing classified information: Title 18 U.S.C., section 793, and title 50 U.S.C., section 783. The former refers only to cryptographic or communications intelligence, and the latter forbids disclosure only to foreign agents or members and officers of Communist organizations.

It is hard to believe that the White House is concerned that investigation into the Watergate affair will reveal still secret electronic surveillance techniques or code books. It is hard to believe that the White House fears that members of the grand jury, the FBI, or the Ervin committee are hidden subversives. Thus, I believe that the guidelines' reference to classified information is gratuitous and misleading. It is not the integrity of our national defense apparatus that is at stake in the Watergate investigation, but the integrity of our political process.

I hope, as we move into this new round of hearings on executive privilege, that these and other questions will receive full discussion and some clarification.

It is my pleasure this morning to welcome as our first witness a distinguished Senator and former Governor of the State of Iowa, a great man in my judgment and a good friend above all that, Senator Hughes.



STATEMENT OF SENATOR HAROLD E. HUGHES, A U.S. SENATOR  
FROM THE STATE OF IOWA

Senator HUGHES. Thank you, Mr. Chairman. I appreciate the opportunity to appear here this morning.

It is a privilege to appear before these distinguished subcommittees to offer a few personal observations as a Senator and former Governor about the overriding danger to our free institutions of secrecy in Government. We of the present Congress and our predecessors have let this matter slip too long. We cannot allow the secrecy in Government that has been built up through the years to remain built in for future generations.

It is self-evident that without an unacceptable level of Government secrecy, Watergate scandals that now rock the Nation could never have taken place.

The hazard is that in our immediate preoccupation with the sordid criminality of Watergate, we might lose sight of the fact that the secrecy we associate with Watergate is pervasive throughout our Government operations and that it is imperative that we take decisive, corrective measures while the iron is hot.

In this light, the present series of joint hearings by these subcommittees assumes an extraordinary importance to the preservation of our free institutions.

The extended concept of executive privilege, of course, has become one of the key fronts for administrative secrecy. So far as having any basis in the Constitution or in statute, the concept is, as Senator Ervin has so aptly put it, executive poppycock. So far as it has worked out in a practical way in our Government, it would be more appropriately termed executive coverup.

The basic issue before us is one of information—information withheld from the Congress on one pretext or another and information withheld from the people on alleged grounds of national security.

“The people’s right to know” is not a pious shibboleth; it is the cornerstone of our democracy.

Under our tripartite system of government, the determination of national priorities cannot be the executive’s private piece of pie. But this is what secrecy in government makes possible—and this is what we are seeing today and have seen before in the administration of both foreign and domestic policy.

The only ones to benefit from secrecy are those with something to hide—mistakes, waste, corruption, or indefensible policies. If decisions cannot stand the light of public and congressional scrutiny, those decisions are probably wrong.

James Reston of the New York Times put it well:

We deeply, almost instinctively, believe that the success of any group of people in dealing with their common problems rests on their knowledge and understanding of the problems to be solved, and on their intelligence, judgment, and character in meeting those problems. And the conclusion drawn from this is that the intelligence, judgment, and character of a majority of the people, if well informed, will probably produce more satisfactory solutions than any leader or small band of geniuses is likely to produce.

One way we get this knowledge and understanding is through free communications media, and in the protection of the first amendment many of you members of these subcommittees have given the Nation

invaluable service. While the Watergate mess was festering, some segments of the press were slumbering or intimidated, but other segments were working night and day uninhibited by threats and undeceived by coverups. In due time, the entire communications establishment, to its credit, rallied to the cause—of bringing out the truth.

Since the Constitution vests in the Congress all legislative power, the Congress needs all information necessary and proper to do its work of developing laws and overseeing their proper execution. Our need to know is total. I sometimes wonder whether the executive branch could paralyze the Congress even more effectively by giving us too much information rather than too little, but that is not the problem we face at the present time. No one would want to see a copy of every memo, every document, every file on a major policy question.

But we do have the right to make inquiries and to demand fully documented answers to our questions.

A few weeks ago, I had an opportunity, along with several other Members of Congress, to participate in a conference on "The Congress and the Executive: The Constitutional Question." The interchange among scholars, former officials, and current officeholders was enlightening and provocative. I was particularly impressed with comments on executive privilege by Professor Raoul Berger of Harvard Law School, who has also testified before your committees. Professor Berger said in this conference, as he testified before these subcommittees, that executive privilege is a myth without constitutional warranty and urged that we not sanctify it or make it respectable by legislation.

I hope you will bear his carefully researched conclusions in mind when considering legislation that deals with this question of executive privilege. It is clear to me that bad history has been used to justify bad practices of withholding information.

Executive privilege is a license to kill—not people, but information, investigations, and ultimately the truth. This committee exposed the logical absurdity of the present administration's position when it obtained the shocking admission from the now-resigned Attorney General that executive privilege could be extended to every Federal employee.

Unlimited use of executive privilege is the first step toward no-holds-barred government.

It is one thing for the President to authorize his closest advisers not to testify about their confidential advice to him, but quite another to forbid them to tell what they know to responsible authorities. Yet this administration tried to forbid Clark Mollenhoff from telling what he knew about the Air Force's efforts to fire Ernest Fitzgerald for his courageous exposures of waste and inadequacies in the C-5A program. And when the President in a news conference admitted firing Fitzgerald, his own press secretary contradicted him. How can we get at the truth, which in this case as well involves a possible violation of existing laws governing employees' rights, when executive privilege—read executive coverup—is invoked?

Our hope for a prompt and thorough investigation of the Watergate scandals was seriously threatened by the White House announcement last week, which the chairman has referred to this morning, that present and former White House officials were to invoke executive privilege in connection with conversations with the President, conver-



sations with each other involving communications with the President, and Presidential papers—"all documents produced or received by the President or any member of the White House staff."

It seems inconsistent and wrong for the President to rule out any immunity from prosecution for these men and yet grant this blanket immunity from testifying on the documents which flow into or out of the White House. We want to get lawbreakers, wherever they have been employed. The offenses under investigation are very serious—felonies—with sizable fines and lengthy jail terms for those who may be convicted.

Let us be very blunt about this. Public opinion polls indicate that there is a widespread suspicion in this country that the President himself may have had some knowledge of these events. While there is no evidence to support this and most of us don't believe it, we do need to know the truth about it. And until we get a full explanation of what happened, our mere uncertainty will undermine the power and prestige of the Presidency. For the good of the President and the people alike, executive privilege must not be allowed to obstruct full disclosure and justice.

Senator Fulbright has already discussed with you some of the problems which the Foreign Relations Committee has had in obtaining information about American agreements with and commitments to other nations. Several proposals have been offered to circumvent this secrecy.

Even in areas not at all involving national security, this administration has clamped a lid of secrecy on information of great interest to the Congress. For example, it took lengthy litigation to secure release of the Garwin Report for the Office of Science and Technology, which pointed out major deficiencies in the proposed SST.

Let me mention just three other areas where information has been denied to members of the Armed Services Committee, despite the evident utility of such information for the committee.

Although Pentagon planning is on a 5-year basis, and the services admit scheduling procurement outlays for 10 years, the Congress is told of budget plans only 1 year at a time. Thus, each year we buy camels after looking only at their noses.

Requests for long-range plans are routinely denied on the grounds that they are for "internal planning" purposes only. No one would want to deny the President the right to change his mind about future budgets, but I believe the Congress has a right to have access to the same information in order to safeguard the interests of taxpayers.

Secrecy also continues to surround U.S. activities in Indochina. We are told that the North Vietnamese are violating the January cease-fire agreement, but we are denied the facts about what the United States has done or is doing which might prompt such violations. For example, my office has been trying for 2 months to secure a list of the equipment and materials furnished to South Vietnam under the terms of the cease-fire agreement, which permits only piece-for-piece replacement. Still I have no answer, despite the requirement that these deliveries be sent through control points in Vietnam with the information furnished to the Control Commission and thus to the parties to the agreement.

In other words, our Government is reluctant to prove to us that we are not ourselves violating the terms of the agreement. Before we are asked to support increased funds to finance this war, we deserve to be told how the existing money has been spent. And as a member of the Armed Services Committee myself, I might add, I resent this inability to get information in relationship to what we are doing.

A third issue is that of secret activities, such as those performed by the CIA. No one would deny the need to preserve secrecy about the means by which information is obtained on a potential enemy's military capabilities and intentions. But when, instead of gathering intelligence, we intervene secretly in the internal politics of other countries, as in Chile, or when we conduct secret wars, as in Laos, the Congress has a right to know and to pass judgment on these activities.

I am sure you will consider these problems in developing legislation to increase the availability of information to the Congress.

The other aspect of the secrecy question is that of classification—the denial of information to the public at large. Once again, no one would deny the need to protect our own defense secrets. Existing laws already provide deserved penalties for disclosing information vital to the national defense with the intent or effect of harming this country's security.

As we all know, much of the information now classified does not deserve the secret stamp. One set of data with which I have been particularly concerned is the bombing and casualty figures on the war.

Each year that I have been a member of the Senate Armed Services Committee, I have asked the Defense Department for monthly American air combat sortie and bomb tonnage figures for each of the several countries of Indochina. These have been provided, albeit with some discrepancies, but with a classification of "secret."

Why should this information be withheld from the American people? The people bombed know what has happened to them; Hanoi radio reported sortie figures. The only ones who did not know whether or how much we have been bombing in Laos or Cambodia or North Vietnam were the people of the United States, who were being asked to pay for and support this military strategy.

Even today, bombing figures are still aggregated for all of Southeast Asia, and historical figures have yet to be released.

Perhaps more disturbing is the Pentagon's policy of concealing casualty figures. The public has been given only the vaguest information on the number of Americans killed in Laos. Recently, I received a reply from the Defense Department to a question on the number of Americans killed and wounded in Laos, Cambodia, and Thailand during the past 3 years. This information, important as it may be to understanding continued American involvement in this war, is classified "Confidential." Can you imagine that? I believe the people have the right to know this information.

One responsible and unobjectionable way of getting such information released, in my view, is for the Congress to require it by law. I have already proposed legislation permitting the Congress to declare that the disclosure of certain information now given to the Congress on a classified basis would not be harmful to the national interest and requiring that it be made public by the executive branch. While my proposal deals specifically only with the facts on combat air activities and



U.S. casualties, it could be amended in the future to cover other materials now classified.

The abuses of secrecy came home to me most clearly last year during my involvement in the investigation of the unauthorized bombing raids conducted under the command of Air Force Gen. John Lavelle. It took weeks of probing testimony to pry the facts about the bombing out of the Pentagon. Although the Defense Department had allegedly conducted a thorough investigation of the matter, the Armed Services Committee was able to get at the truth, in my opinion, only because we had to act on pending nominations, and that is the only reason. If we had not had this lever, we might still be in the dark.

Another discovery in the *Lavelle* case, strikingly similar to what we are reading in the papers today was evidence of a massive coverup of information. In fact, far more energy appears to have gone into the efforts to conceal the facts in this case than to take corrective actions to see that such violations can never happen again. The Air Force took strong action—removal from command—once it had evidence of General Lavelle's misconduct. But official comments for several weeks referred only to a resignation for personal and health reasons. Only persistent efforts by the Congress forced the Pentagon to begin to reveal the full story.

Surely we have reached a sad state of affairs in this country when the gut reaction of people is to disbelieve their Government. But the evidence of deceit is too plentiful to be ignored.

Perhaps the more urgent problem for the Congress right now is to prevent the adoption of new laws which strengthen the classifiers and undermine the public's right to know. Mr. Chairman, you have done a valuable service by ferreting out the new proposals from the 600-page proposed Criminal Code Reform Act, and in calling public attention to what amounts to America's first official secrets act.

This proposed new law strikes me as another shocking attempt by the administration to manipulate the media: what the White House can't control, it now seeks to punish. The legislation would make it a penalty to release, receive, or publish classified information, regardless of intent or actual injury. In effect, this law could give each man with a rubber stamp a jail key for anyone who disagrees with him. The result would be a stifling censorship by classification.

If this law had been in effect in the past, no doubt there would have been energetic prosecution of those who first told us about Mylai, or General Lavelle's illegal bombing, or the deficiencies of programs like the C-5A.

And if it should become law, you know as well as I that it would not be used to prosecute the Pentagon official who leaks word that, say, the Russians are building some missile twice as good as ours. Instead, it would be used against the man who tells a reporter that the F-14 can't take off from a carrier with a full bomb load or that the CIA is fighting a secret war in the Philippines.

If we are to eliminate unnecessary classification, we also have to oppose efforts to fortify existing secrecy with such powerful, repressive weapons.

I might add that I resent executive branch innuendos that the Congress cannot keep secrets which are provided to it. I for one am not aware of any instance where a congressional "leak" harmed the vital

interests of this Nation. And I would challenge the Executive to show that there were more nondamaging disclosures from this end of Pennsylvania Avenue than from the other. This is a false issue, and no excuse for denying information to the Congress.

Recent history gives numerous examples of the dangerous consequences of secrecy in weakening the bonds of trust and cooperation within the Government and with the people. The efforts by officials to protect themselves and conceal their mistakes is more likely to be a crime, against the national interest, than the attempt to expose such coverups.

I would offer only a few more suggestions in conclusion. I am pleased to be a cosponsor of the chairman's proposed amendments to the Freedom of Information Act since they strengthen the rights of citizens and put the burden of proof for concealment on the Government.

Although I am reluctant to grant an executive privilege which never should have been asserted, I hope that any legislation you may develop will make any denial of information difficult to invoke and ultimately remediable by some appeal, either to the Congress or the courts.

On the question of declassification, I have already suggested one possible route: direct legislation if nothing else will avail. A regular process would, of course, be preferable, and along those lines I would favor a third-party public information review board with broad investigative powers like those of the General Accounting Office and composed of members who can exercise professional judgment on the competing requirements of national security and the public interest. Such people would be those with prior experience in journalism and public affairs.

In the long run, the more we unclog the channels of information, the more likely we are to build a vigorous and responsive democracy. Unexamined policies are not worth having; we need open policies, openly arrived at, and tested by informed public debate.

Thank you very much.

Senator MUSKIE. Thank you, Senator Hughes, for an excellent statement. You know, I think it is important to remind ourselves over and over again that parliamentary power, legislative power, became meaningful in the British experience only when the British Parliament acquired two powers: one, the power of the purse, and two, the power to investigate. And any legislative institution deprived of those two powers becomes meaningless.

It is significant to me that these two fundamental powers have been under such aggressive attack by this administration as it challenges the Congress. I think that one way to highlight the dangers of the attack upon these powers is specific illustrations of what they involve, and I think the service you performed in the Lavelle matter was an outstanding and significant one in this respect.

Here is an instance of information protected and held secret by the executive and by the Pentagon as bearing directly upon the national security and yet when the facts were fully disclosed, I think the public generally concluded that national security interests weren't injured. This sort of thing happens over and over again.

Senator HUGHES. Mr. Chairman, I might comment further on that, if you allow me the privilege. Several sections of the Code of Military



Justice were directly violated in these coverups and in these acts. At least one of them specifically called for trial by court martial for those who violated it, and specifically mentioned those who signed official documents with an intent to deceive or supply misinformation.

Now we have numerous false documents, signed and initialed, in the files of the Armed Services Committee. Repeated efforts to reopen this investigation have been denied by the Pentagon and the Secretary of Defense. With the violations a matter of record, they say the book is closed. One man paid a small price, in my opinion, for what happened—not just in the bombing, but in undermining justice and discipline. The effect on the military and the effect on this country I think will ultimately be traumatic.

My own requests to ferret out the names of those who were involved in this travesty of justice have been defied by the Pentagon. When I held up the list of nominees for advancement and requested only holding 185 names, they held up five thousand to put the pressure on me and on the committee to force the release of those 185 names for promotion.

As a member of the Armed Services Committee, all I wanted to do was to ask those men questions as to their involvement in these illegal acts of warfare, nothing more than that before we voted for their promotion. I was denied that right by pressure from the members of the committee and the services and in every other way.

To this day the Defense Department certifies a document which says no one involved in the promotion list was involved to their knowledge, but we have to go through the thousands of names for promotion and recheck them against the names on the falsified documents. And then, if we request the questioning of one individual out of a list of 6,000 names, they say we shouldn't do that because the individual may not be guilty and to single him out of the list would imply guilt whether there is guilt or not, so we have no right to do it.

Now, Mr. Chairman, I don't believe in the conduct of war anyway, but if illegal military acts have been performed in violation of the Commander in Chief of the United States and in violation of the Joint Chiefs of Staff and every directive that has gone out, then the people involved in them ought to be brought to justice, and they haven't been.

Senator MUSKIE. Now the danger of all this is that secrecy becomes an addiction. I was interested in reading the report of the review board established by the President about a year ago to implement his Executive order designed to stimulate declassification of documents that have been classified.

This is characterized as an encouraging progress report, but the fact is that out of 160 million pages of classified documents relating to World War II, 29 million have been declassified leaving 131 million pages still classified.

The second point to be made and emphasized over and over again is that classification has no specific statutory authorization and never has had with the one exception I noted with respect to the Atomic Energy Act. So that the whole classification system and the stamping of these documents as classified is built on Executive orders, in recent history beginning with President Roosevelt in World War II and continuing through President Truman's Executive order in 1951 and then on to President Nixon's of last year. The structure was always

built on Presidential Executive order, and now you have the Presidency extending executive privilege to cover classified information.

The classification procedure was established only by the President or almost only by the President and then you have the routine reluctance of executive departments to give information to the Congress as the foundation for this whole secrecy in government that produces incidents such as the Lavelle incident, the Watergate incident and so many others.

Every example we see that comes to light of the consequences of secrecy drives home the point that secrecy in a democracy is a bad thing.

Senator HUGHES. Could I just add one thing, Mr. Chairman, in relationship to current events, and they break so rapidly now. Unless you get a news broadcast five times a day you don't know what they are. But as you know, the director of the CIA comes before the Armed Services Committee. The former director in a closed meeting and the present Director were both specifically asked if there was any involvement by the American intelligence community in domestic political affairs. Both men specifically denied that there was. We know from information today that there was involvement. Now if the Director—and I happen to believe that both of these men were honest men—if the Director of the CIA didn't know what they were doing, then I suggest to the Chair that we are involved in some extremely dangerous policies internally as well as abroad that should be thoroughly investigated. This is a case of misinformation rather than withholding information. I am sure that the Director would have told us had he known. I happen to believe he did not believe that there was any involvement whatsoever internally in this country or he would have told us the truth.

Excuse my interrupting.

Senator MUSKIE. No; I think it is very, very relevant. You know, your Air War Disclosure Act to which you made reference in your testimony suggests giving the Congress statutory authority to declassify and make public some secret information. What would you think of the advisability of establishing a congressional agency with such authority on a broad and systematic scale? Wouldn't that have the effect of counterbalancing executive secrecy practices?

Senator HUGHES. I think it would. As you know, on the last page of my statement I made a suggestion of an external agency controlled by the Congress, but I think it would have the effect of balancing the executive and I also think it would have the effect of obtaining what I have been trying to get since I have been on the Armed Services Committee—namely, to get the release to the press, after 10 days' delay, for the consumption of the American public, information on the number of sorties U.S. planes were flying, the tonnage of bombs we were dropping, and the casualties that occurred and where they happened. Now the enemy obviously knew all of this. The enemy obviously knows how many sorties we are flying, what the tonnage of bombs we are dropping, and what his casualties are, but we the American people were denied that information. For what reason? I can only suspect it is to cover up the expense, the involvement, and what and where we are bombing and who we are killing, in a war for which there was no authority in the beginning and none today, and it is still continuing regardless of what we say. I can't conceive of a free democracy being



denied that sort of information nor can I conceive of any danger it would pose to the national security of this Nation except in the public opinion of the world and I believe that the people of this country would bring it to an end if they had the information.

Excuse me, Mr. Chairman.

Senator MUSKIE. At least they are not reluctant to reveal to us the cost of this continuing bombing because they need congressional authorization to get the money. It was \$150 million that is being asked that we transfer to fund the bombing in Cambodia which gives us some notion of the magnitude of that exercise.

Senator HUGHES. Mr. Chairman, unless I misinterpreted the Secretary of Defense last night on the news, he says they are going to do it whether we give them the authority or not. They are going to go ahead with the bombing and they are going to spend the money and it doesn't make a damn bit of difference what we do over here on the Hill.

Now I resent that sort of arrogance and defiance. Maybe there aren't enough of us.

Senator MUSKIE. I should think by now there would be some sensitivity to the fact that arrogance is a counter-productive quality at this stage.

Senator Hughes, I'm delighted that you have testified today. As always, your testimony is pertinent, to the point and it gets to the heart of the issue. I hope that these subcommittees can make a contribution. No one is more aware than you of how difficult it is going to be to overcome the built-in resistance to changes, and to overcome these kinds of habits. These have been with us a long, long time. They have acquired a life of their own in the series of national emergencies, beginning with World War II and continuing on through the Korean and the Vietnam wars that have resulted in expansion of executive authority in so many ways, and these are going to be bad habits to break. They are addictive I think.

It is going to take some perceptive and precise kinds of legislation to correct these habits. I'm delighted to have your testimony to help us along.

Senator HUGHES. Well, I will thank the Chair and I want to commend the Chair for its dedication to this field because it is one of the most vitally needed searches into the American political structure, the governmental structure today. There is a real question in the minds of young people in America and many of us who are older about the viability of a democracy such as ours, which has been called many times the last great hope in the world. I think the danger is from within through actions like this rather than from without from potential enemies abroad.

We have seen happen in the last 2 years more to destroy the viability of the belief in democracy before the eyes of the world than has taken place in all of the wars collectively we have fought in our history. And that has happened through our own people under the guise of patriotism rather than having confidence and faith in John Q. Citizen and the American people.

I compliment the Chair on his continued dedication and work to bring this not only out in the light of the legislative field, but so that the people of America have that restored and continue these freedoms on into the future generations.

Thank you very much.

Senator MUSKIE. Thank you, Senator.

Our next witness is Mr. William P. Bundy. He has held so many titles I don't know which one to use, but he is presently editor of Foreign Affairs and maybe that is the title he likes best of all.

# STATEMENT OF WILLIAM P. BUNDY, EDITOR, FOREIGN AFFAIRS

Mr. BUNDY. Thank you very much. Do you want me to read my statement?

Senator MUSKIE. You can present it any way you like.

Mr. BUNDY. All right.

Senator MUSKIE. We want to get plenty of enlightenment from you. If you can do that by reading your statement, fine.

Mr. BUNDY. I will paraphrase it, and you have the full text before you.

I would like to go on a little bit beyond my statement because through your counsel, I got last night, which I should have seen earlier, a copy of the new executive guidelines on executive privilege and they seemed to me to call for a further comment or two.

It is a great privilege to appear before this subcommittee. I think your inquiry is a very important undertaking. This is a subject that very badly needs clearing up.

I don't come before you as a legal expert, as I'm sure you know. I haven't practiced law for 22 years.

Senator MUSKIE. We are in the same boat.

Mr. BUNDY. I guess we are.

But rather as one who served for 18 years in the general area of defense and foreign policy in the parts of the Government that make use of extremely highly classified information on a habitual basis.

I was thinking as I listened to Senator Hughes that for 18 years I don't suppose I saw many papers that weren't classified secret or top secret and seemed to me to be validly classified at the time. They might have been reclassified later, but that is the kind of work I was doing and it is that area that I am talking about.

Now occasionally I was on the fringes of cases where executive privilege was invoked or where it served as the background for withholding. So that I am not a legal expert, but I have had a fair amount of experience in the practical application of problems in this area.

On executive privilege I testified before Senator Ervin's subcommittee in the summer of 1971. I think you have the record of that and if you wish to pursue any part of that I will be of service.

On the question of classified information, I believe the subcommittee has before it and is considering Senator Roth's bill, S. 1520, which would provide for an outside committee to review the whole subject of classification and the whole subject of sanctions to apply it or to correct matters of failure to disclose or matters of that sort. I would like to say I read that bill with care and I would support it very strongly indeed. I think this kind of commission to get into the whole subject, including possibly some of the questions of Presidential papers, and historical papers—and those might be second order of priority because I think the first order of priority would be to get at present instances of nondisclosure and classification—I think that is a good



idea. I think that kind of thing would do a really important service and I think you could get distinguished citizens to serve on a commission of that sort. It has, as a matter of fact, a parallel in the British experience where in the last 2 years they had a commission headed by Lord Franks which I think has cleared the air to some extent. Whether or not its specific recommendations are adopted, I think it has helped.

In addition, I understand proposals have been made for some sort of a standing commission to review specific cases, where secrecy is invoked by the executive branch either vis-a-vis the Congress or vis-a-vis a member of the public requesting information. I am more dubious about those proposals, because I think you would be creating a bureaucratic monster that would be likely in the real world of bureaucracies to fall rather rapidly to a low level of mediocrity and in the end mess up the problem more than it would help it. That is a practical reason primarily. I am not against such a body in principle. I can see that in many borderline cases, of the kind Senator Hughes was citing, which are not in the most sensitive areas, that a commission of this sort might be able to give a commonsense verdict, but I have doubts about whether you can get to serve on such a commission on the continuing and unrelenting basis that it would require the kinds of men who could judge whether in the tough cases of withholding and the Defense Department policy areas, that the withholding was or was not justified. In other words, I think it would be a tough job to keep a commission that would have credit and prestige, and I think that it's fundamental to any such proposal that it should have the credit of a court, as it were, to come up with something that people will accept as the best answer in a case of contesting judgment.

So in short, I am very strong in support of a one-shot commission to really go into this subject, and I hope very much that that will be approved, but I am much more doubtful of a standing committee to review the day-to-day questions that arise.

Now, why the difference? Because I do believe the question of secrecy in the executive branch remains in the last analysis one of applied commonsense on the one hand and of the felt pressures of a free-speaking democratic system on the other. I don't believe you can legislate results or bring them about through a regulatory or arbiter body, however, well intentioned. Let me come back in a moment to some of those basic points.

These same views lead me to oppose vehemently changes in the Criminal Code proposed by the administration and embodied in S. 1400 and which you yourself, Mr. Chairman, have brilliantly diagnosed and criticized in your recent speech and on other occasions.

I read in the papers that the authors of these proposals claim that they are largely a restatement of existing laws. On my preliminary analysis, I disagree strongly and believe the positions go much too far and should be rejected out of hand by the Congress. I think there are parts of those laws which may be changed, but not in anything like the way the administration is proposing.

Mr. Chairman, the basic point as I see it is that we are dealing not only with the competing interests of two of the three branches of our Government, but with the conflict of two national interests: one in the fullest possible disclosure of the Government's business, and the other in the effective conduct of the executive branch, including particularly

its conduct of foreign relations and defense. And the existence of those two interests is the essence of the question of executive privilege and the secrecy of national security matters that is usually embraced within it. There is no question that the national interest in fullest possible disclosure is the lifeblood of our democracy. In most areas of the Government, it should be absolutely taken for granted, and in the fields of defense and foreign policy it should be the rule rather than the exception, taken into account at every stage and neglected at the peril of the whole underpinning of our actions in these fields.

Peculiarly, it is the business of the President—of his decisions and the tone he sets. And it is one of the crucial elements on which the people constantly judge his performance.

But in these two fields, defense and foreign policy, I do submit that there is a clear national interest in secrecy on many occasions, and for periods of time. Thomas Jefferson was categorical on this subject in a statement he made in 1807. I think it was in connection with the *Burr* case, but it stood as a dictum of his beliefs generally that all governments in the history of the world have found it necessary to do business in secret and to have their executives retain the power to withhold information.

I have given the citation for the particular quote in my statement. I would add that since Jefferson's time and since especially 1940 when the United States assumed world responsibilities—and this will continue under any policy that we may pursue, including the reduction of commitments abroad and generally much less forward policies—the need for some degree of secrecy has permeated not only defense matters and sensitive dealings with foreign nations, but also a lot of contingency planning deliberation and argument within the executive.

Nowadays, some people think of this, with the Pentagon papers in mind, as a nefarious power to plot war in secret. I will pass over the question of what Congress and the people knew in that particular case, which I believe was a great deal more than some accounts have suggested, but the fact is from my long experience that such deliberations much more often need protection for exactly the opposite reason; to protect the careful framing of courses of action that avoid war and lead to constructive initiatives for peace and world progress.

It takes an effort, Mr. Chairman, to go back in one's mind to such periods, but there have been many when the public mood was far more belligerent and hostile than the serious mood within the executive. The China hands who tried to tell what was happening toward the end of World War II and whose recommendations might have spared us two wars, Korea and Vietnam, needed the protection of secrecy not only then but for some years thereafter: the revelation and the *ex post facto* judging of their advice did serious harm to the Nation and to world peace through their ousting from Government. I think that is a very unfortunate byproduct of the 1949 white paper among other documents, which revealed in detail the views of men like Davies and others and thereby exposed them to the withering fire which in the end, through actions that we all deeply abhorred, led to their ouster from Government, or made it very difficult for them to continue.

We have a serious question of disclosure in that case, done for a good purpose by the Executive but leading to the airing of subordinate views that had a very major effect on the continuing utility of these men and it is that kind of case you have to have in mind on occasion.



Over and over again in my experience, honest and frank warnings in the chambers of the executive have led to restraint—warnings which could not have been so honest and frank if it had been thought that they would have been divulged at any early time to a public and Congress that included people of violently contrary minds. It bears reminding that the classic case of executive privilege in the Kennedy administration was Robert McNamara's refusal to give the names of men who had censored presumably somewhat belligerent speeches by senior military officers that were out of line with the President's policy of seeking *détente*. You must have command responsibility in a case of that sort, as Mr. McNamara did in that instance by taking the responsibility himself for the decisions that were made—and as I have done when I was Assistant Secretary over and over again to take responsibility to congressional committees for recommendations of my office, reviews that we have formed and not bringing up the subordinate officers who had recommended those views to me. A command responsibility is basic and I think it must be at least at the political level of the administration in the area of defense and foreign policy. But the revelations of internal deliberations and lower level advice, I would say, no, or at least not at the time.

That is part of the national interest in the doctrine of executive privilege as an inherent part of the separation of powers and of secrecy, and it is not easy to have it both ways. When there is unauthorized or premature disclosure of executive deliberations, the inevitable result in the way human beings behave, and for good reasons, more than bad in my judgment, is that the circulation is narrowed and its frankness as well. I venture that in the present administration, not only because of this reason but in significant part because of its internal secrecy and narrowness have been carried almost to the point of absurdity; far greater than any of the four previous administrations in which I served. The narrowness, the tightness have been carried to extraordinary lengths. It is my judgment that serious results, in some instances, have flowed from this—like a failure to notify friendly countries of the steps we have been taking where that could be done without breaching the secrecy up to the time of the announcement, and in a number of cases, the narrowness has meant that people whose words and advice should have been heard from were not. I think that is a very serious matter and regrettably as a practical human matter, it is tied up with whether the executive thinks that the people can be trusted, which is primarily a matter of executive administration and morale but does have something to do with whether pressure is afoot for this kind of disclosure.

So it is a balancing of interests in the first instance, disclosure versus effective operation and I would draw a distinction that has to be stated honestly, and I would say it is one that I accept. I believe there is a clear difference between what the executive is entitled to withhold from the Congress and what the executive is entitled to withhold from the public. The two, I believe, are not at all the same in our system of representative government. I argued at length 2 years ago—before Senator Ervin's committee—that Congress was entitled in the areas of foreign policy and defense to much more than it was getting. I tried to suggest ways the flow could be improved at both ends of the line. But over and over again there are things that can and should be told to the Congress that cannot wisely be revealed to the public or at

least not without significant damage to what can rightly be described as the national interest of the United States. I could give you a lot of cases, if you wished to pursue it.

This is not at all to say that disclosure to the public has been adequate or that it was adequate during my service in government. Generally speaking, the point at which a given issue should be presented to the public or a decision made known comes a little after its presentation to appropriate representatives of the Congress. In timing alone, and I think also in substance and detail of background, the two are different. I have yet to see a member of the congressional leadership emerge from the many sessions where the President has discussed a pending decision, and tell all upon the steps of the White House. I think the reason is that in practice Members of Congress accept that in their representative capacity they should know things in more detail than the public and know them sooner. Some of their constituents might even say that that is what they are there for.

So, if one views the matter as a constant balancing of interests, you have on the one hand the interest in disclosure which may vary from case to case and in which the felt consensus is a very strong one and you have certain distinctions that I think help in weighing whether on the executive side secrecy is justified. You have the distinction between sensitive and less sensitive matters, which is roughly what would be of real interest to an adversary power versus what is really only an internal matter or a personal matter or things of that sort. I do not think the *General Lovelle* case involved a true instance that the Russians were worried about, and therefore was of less concern and therefore less justified to withhold anything about on valid grounds. One can sort of grade cases in a rough way.

Thus, there is current versus historical secrecy, which is obvious, although one must bear in mind that in the case of ongoing matters history can't take hold of something without disturbing the present at least for some time to come.

Then I think there is an important distinction between process and the time when the executive forms a view or reaches a decision. That is part of what I was saying about the China hands, and people of that sort in government protecting their staff advice and it has to do with what you might say are the roots of the doctrine of executive privilege, as I understand it. I think it basically stems from the separation of powers and not from any exclusive provision of the Constitution and certainly not from any provision of law. Nobody suggests there should be disclosure of what Senators say in the cloakrooms, or in executive committee hearings, for that matter, or what the Justices of the Supreme Court say to each other. The same is true in the executive branch and it really is a process that is not confined to public bodies but is true in law firms, trade firms, political parties, primary campaign headquarters, as well. Now the distinction between the point at which a thing ought to be fully disclosed—and again I come back to command responsibility—and the staff level kind of thing is not always obvious. I am not exactly flatfooted on this. I did a rather long discussion of it in my testimony 2 years ago, but it is important it seems to me.

Mr. Chairman, in my statement, I have gone at length into a case that seems to me is the clearest demonstration we have ever had that



all rules on this subject can go by the board. If you took what I was saying, you could say that current information about processes of Government on sensitive or on defense matters being revealed to the public was the most sensitive type of case. Yet you will recall as I do a case where matters falling very flatly under that heading were fully discussed to the Congress and revealed in overwhelming proportion to the public, and the results were a triumph for our democratic process. That was the MacArthur hearings of 1951 where the top officials talked about everything they had thought about and met about, stopping only at the actual words spoken to the President, and the material was printed in every newspaper in the land after a very narrow security screening for information that could literally damage our forces in the field.

I think that the lesson is clear that the felt sense of the national interest may in a given case override every other factor and that is one of the clear points it seems to me.

Well, should one then conclude that the whole concept of secrecy is a nonsense to be discarded? I think not. For the case was unique in both precision and importance. And the great feature of the MacArthur hearings was what deserved to be called "due process." The proceedings were intense, but they were conducted by a great Senator with judicial instincts, Senator Russell. They were comprehensive—all sides were heard and key witnesses spent days on the stand—but at all times they were fair. In the end a story had been told that had the most profound effect on the contemporary national temper—both with respect to the firing of General MacArthur and with respect to the accepting of limited objectives in the whole Korean war. It is a story that has also served as a continuing gold mine for historians.

Obviously, one of the most tragic aspects of the whole Vietnam experience was the failure, at some appropriate point, to hold comparable hearings—and indeed the mutual defiance of the executive and the key Senate committee from early 1966 on contributed. I need not dwell on that: the contrast is painfully evident, and it must be bluntly said that the advent of television, and the current ethos about its participation in public events, is a part of that contrast.

Now, of course, the model due process achieved in the MacArthur hearings involved an immense expenditure of effort and talent, immobilizing both the executive and key committees of the Senate for weeks. In that case it went to the border of disclosing matters of national interest and concern and I have no doubt the transcript was read avidly in the Kremlin and in Peking alike and that much was learned. But from every standpoint the eventual gains far outweighed the drawbacks.

On the question of what is to be disclosed, there is a balance in every case and the rub is who is to decide. I wish I could see a clear answer to that, Mr. Chairman. I know it is what you are looking for, but I don't, except the applied commonsense and patriotism of the participants at both ends of Pennsylvania Avenue, aided and guided by the felt pressures of public opinion.

Now, on these questions of balance, the national interest in disclosure versus the national interest in secrecy and the effective operation of the executive branch which requires a measure of secrecy, criminal sanctions are crude weapons at best, to be used sparingly.

The very decision to prosecute involves the executive deciding that the balance has been breached and putting the defendant to great pain and trouble.

Beyond that point, I do not believe the executive should have the powers that your analysis indicates are implicit in the legislation presented by the administration, and particularly to say that the present document is classified and there may be no inquiry further as to whether it was validly classified. In effect, the Government demands a unilateral right to decide key issues at the trial. I recognize that it can be very tough if the executive has to go out and drop the prosecution of a valid case because it dare not reveal the extent of the damage done by the disclosure. And the classic case of that was in 1942, and I remember it vividly and discussed it with Attorney General Biddle, who was in charge at the time. The Chicago Tribune came out with a story that to a discerning eye would have revealed that our Navy was reading Japanese messages, the Japanese naval codes—information of the most profound sensitivity and gravity which certainly could have changed the whole history of the Pacific war. And the Attorney General had to decide whether to prosecute, and under the laws that existed then—and I think the same problem still exists—to go to court he would have had to reveal what the offending passage was in the article, which of itself would have focused attention on it, and thereby increased the chances that the Japanese would realize what was up. And he decided under the most strenuous representations by General Marshall, I believe, and others, that he could not pursue that prosecution. By a miracle the Japanese didn't get the passage or didn't understand the significance or were too confident about their codes, so the damage he feared was not done, but it is a classic case of the executive being unable to prosecute because it cannot reveal national defense matters which form the very basis of the charge. But I think that is an inevitable disability that you simply have to accept: that is, that you cannot rely on the executive determination without proof. That would be swinging the pendulum much too far the other way.

And exactly this kind of thing in a misguided British prosecution has led in the recent past to a Royal Commission proposing major modifications in the British Official Secrets Act. Now a word on that act, because it is a common point of reference and has been in effect for years. People have said, why don't we have an Official Secrets Act? Wouldn't it be a lot handier if we did? No doubt some of that is being said today. I lived under that act during the Second World War and watched its salutary impact at the time we felt danger, but the Franks report last year now makes it clear how hard it is to apply under the present condition. As I read the report I don't see any of its recommendations that could sensibly be carried over into the American system.

The Franks report goes into a great deal of detail on the types of information from one category to another and one particularly looks at it to see if it would single out particular categories of executive documents that deserve the protection of criminal sanctions, and they concluded that in the British system, Cabinet papers would deserve that.

In my own experience in the National Security Council area I would think you simply can't define any paper that deserves that particular



thing more than another. So I looked into this with some detail in my mind and concluded that there is not anything specific to be learned from that report applicable to the American experience.

But more generally, Mr. Chairman, I think the basic point is that the Official Secrets Act is not in our style. Appropriate as it may be to a parliamentary system with a Cabinet and a long-entrenched and encrusted bureaucratic tradition, those features don't prevail in this country. They are not the way we do business.

So I come back, Mr. Chairman, to where I began. There are no absolutes in this subject, and I would beware of proposals that set them up, either in the criminal code or in the powers of a standing commission. I understand legislation for a standing commission does provide that the executive might still invoke the privilege in given cases, so that I am not referring to a specific law, a specific proposal.

But in the end it comes down, as I said, to statesmanship in both branches, at best. That I think existed by and large and pretty strongly in the Truman administration, in the Eisenhower administration, in the Kennedy administration, and in considerable part, if not total, in the Johnson administration. That is the best way to do it. At worst it comes down to a hard bargaining situation: to a give and take, to a certain amount of infighting on both sides going on all of the time and to the felt prestige of each of the two branches, with the sovereign public. I would venture that in these last respects, the situation has changed somewhat in the period since your subcommittee began its hearings. And not coincidentally, Mr. Chairman.

May I say one word about——

Senator MUSKIE. I wonder if I might interrupt just a moment? I will be right back.

[Recess]

Senator MUSKIE. You were going to go into the new guidelines on executive privilege.

Mr. BUNDY. If I haven't talked too long, Mr. Chairman. It would take just a minute or two longer.

Senator MUSKIE. Not at all.

Mr. BUNDY. This is new to me, too.

I am very struck, Mr. Chairman, as an amateur by the attempt to say that the basis of the whole matter or at least of withholding that is provided in these guidelines, is "witnesses are restricted from testifying as to matters relating to national security not by executive privilege but by laws prohibiting the disclosure of classified information."

I will leave aside just how far that is intended to go with respect to the really atrocious Ellsberg matter of burglary. But it seems to be part and parcel of the position that the administration lawyers are taking about the proposed amendments in the Criminal Code. They are trying to say that they are merely codifying that which already exists and that the root of the thing is that they are already authorized by law in some fashion to classify information and they are trying to weave a whole new hat whereby the basis will be asserted to lie in a legislated power to classify, which in turn can be applied absolutely by the executive in judicial proceedings and so on. I think that is just profoundly wrong as a matter of law.

In my judgment, as you have rightly pointed out in your statement this morning, the statutes that relate to classified information are very

narrow and precise. In my judgment, they are the frosting on the cake. They are the cases where material falling within the broad heading of executive privilege and secrecy is protected by criminal sanctions, because of its clear and specific nature and the gravity of its disclosure. That is particularly true with section 798 of the code which deals with the field that I spent the Second World War in, which is cryptographic and cryptanalytic materials. In that one case a specific degree of criminal sanction has been applied, because we had cases in the 1950's of disclosure of this sort and I think the sanction was written after those cases, and that is as you rightly point out, the one case. The other one is more general, but in the same general category of specific instances, where you can say a penalty has been provided. But the attempts by the administration to shift over and claim a general power of classification deriving from legislation and not from the power of executive privilege seems to me a profoundly wrong doctrine that should be rejected, and if I may suggest, the new Attorney General might be examined with some care in that.

Senator MUSKIE. I hope with different results than the examination of his predecessor.

Mr. BUNDY. I hope so very much.

Senator MUSKIE. Incidentally, I think we ought to include in the record these guidelines of May 3 on executive privilege.

THE WHITE HOUSE,  
Washington, May 3, 1973.

The President desires that the invocation of Executive Privilege be held to a minimum. Specifically:

1. Past and present members of the President's staff questioned by the FBI, the Ervin Committee, or a Grand Jury should invoke the privilege only in connection with conversations with the President, conversations among themselves (involving communications with the President) and as to Presidential papers. Presidential papers are all documents produced or received by the President or any member of the White House staff in connection with his official duties.

2. Witnesses are restricted from testifying as to matters relating to national security not by executive privilege, but by laws prohibiting the disclosure of classified information (e.g., some of the incidents which gave rise to concern over leaks). The applicability of such laws should therefore be determined by each witness and his own counsel.

3. White House Counsel will not be present at FBI interviews or at the Grand Jury and, therefore, will not invoke the privilege in the first instance. (If a dispute as to privilege arises between a witness and the FBI or the Grand Jury, the matter may be referred to White House Counsel for a statement of the President's position.)

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THE WHITE HOUSE,  
Washington, May 4, 1973.

The following is a supplement to the Memorandum of May 3, 1973 regarding the invocation of Executive Privilege:

White House Counsel will be present at informal interviews of White House personnel by Ervin Committee Staff, but only for the purpose of observing and taking notes. Privilege will be invoked by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee.

Senator MUSKIE. And accompanying them is a supplement which does not appear in the press reports. It was just sent out I gather and it might be useful to read this into the record. The original guideline is dated May 3, this is dated May 4, and reads as follows:

The following is a supplement to the memorandum of May 3 of 1973 regarding the invocation of executive privilege.

White House Counsel will be present at informal interviews with White House personnel by Senator Ervin's Committee staff but only for the purpose of ob-



serving and taking notes. Privilege will be invoked only by White House Counsel, if at all, only in connection with formal hearings before the Ervin Committee.

Now it had not been clear at least to me in the statement of May 3 who would invoke executive privilege. Apparently it is White House Counsel who will do so.

Mr. BUNDY. Mr. Chairman, I think the doctrine on that should be nailed down every chance you get that the only person who can invoke executive privilege in the formal sense of the word is the President of the United States and in the case of this particular nature, I think he has to be forced to do it personally in a most explicit way.

I was very sympathetic before Senator Ervin's committee in this respect because I thought it nailed down what had been obvious in the administration's habit of invoking executive privilege without the President's say so.

Senator MUSKIE. I think that is a point on which this administration appears to try to generate ambiguity and then build on the ambiguity to expand the doctrine itself.

Mr. BUNDY. I think so too.

Senator MUSKIE. Well, I appreciate your testimony. It is useful I think to have someone like you who has been involved in the whole classification process for so long to give us this perspective on the dangers and the desirability of limitations on the use of the classification of documents.

I am concerned that we don't seem to get at any very clean handles on the problem of minimizing the practice of over-classification. I do confess frustration and you have confessed frustration yourself.

Mr. BUNDY. I must say as I read the testimony of somebody like Mr. Florence who appeared before you who has seen it at what I would call the margins, well, I dealt with it at what I would call the heart. I don't think Mr. Florence or anybody else would say there was any doubt about the initial classification of the materials, and in the types of cases he fights—the margins—this is very frustrating and I think the one-shot commission that Senator Roth has proposed with your endorsement is a sound way to expose that and to get away from under or lower officials having the power to conceal their lesser actions and mistakes, and so on.

All of that needs getting at and I wish I could see a clear and continuing answer to it. Obviously the administration's rather highly acclaimed new Executive order of a year ago hasn't done more than cut at the very outside fringes of it. I think there is a great deal more to be done.

Senator MUSKIE. Do you think that it might be possible to set legislative standards against which to measure any executive claim of secrecy after a fixed number of years?

Mr. BUNDY. Frankly, I have great trouble with that, and what I believed was Congressman Moorhead's draft which would have proposed automatic downgrading from top secret to secret and from secret to confidential every year. I don't think it works that way. I would like to see the period shortened for the release of all of the materials that can properly be released and all of the kinds of papers that now go into the State Department's collection on "Foreign Relations of the United States." I think we could afford in most types of situations disclosure within roughly 10 years and sometimes even shorter where a particular episode has terminated and where it has no

continuing relevance, where you have gone through that and it has come to a head. I would like to see as one of the proposals that the Roth Commission is set up to consider would be the establishment of a top-notch panel of historians, joined possibly by journalists, and others representing the prodisclosure frame of mind. Inevitably it is a frame of mind that you get into and I guess I am now a journalist, but I am more an executive branch alumnus I guess. I can't help it. I would like to see us get top historians to examine the cases. The men you have now trying to decide those cases are simply not up to the job. They shouldn't be asked to do the job. They can point out potential sensitivity but only the men in command or in command currently can say whether that is still a serious matter.

Take the case that hung up large sections of State Department papers for a while when I was in the Department. This was the so-called China papers; that is papers dealing with our relationship with Chiang Kai-shek. The historians could tell us in the Department that this is a nasty reference to Chiang Kai-shek, but we had to decide and eventually did decide on release after they had been held up for years in the Eisenhower administration and indeed I think in the early years of the Kennedy administration and so they finally decided that they should be released.

You have a case there where you must ask is it more important that people should now understand these episodes in full with full documentation or is it important, seriously important, that we may offend some foreign nation or some foreign statesman who has some degree of continuing importance to our current foreign relations. I think a group that could decide this for historical papers would be a very important thing.

In the case of the Pentagon Papers, I was very receptive to the proposal by Senator Stennis for a group of historians to dig out this material and to work on it and in effect come forward and as they came forward to declassify all that they felt relevant and useful. This seems to me to be something that we just haven't put our minds to adequately; an adequate way of bringing out the important historical episodes and really analyzing them.

I think the Congress can take initiative in this area by a resolution in some cases. I always hoped that we would have a historical inquest on the whole experience in Vietnam. It seems to me we should because the Pentagon Papers are so incomplete. The material written about them was concededly *ex parte* with no discussions with important participants. We need something bigger.

I think we can shorten those periods for release. This is a major undertaking in itself which I suggest is one of the agenda items for a commission as a second order of business after the current thing, but I doubt if an automatic downgrading is the panacea. Again and again it has been tried. We have had automatic downgrading. It is better than not having anything, but it is not sufficient in some cases, because a matter that was not thought likely to last may turn out to be much more sensitive than they realized. There always is the odd case.

Now maybe we just better put the burden of proof heavily on anybody who wants to block the release of the document and that I think you should do. But to make it absolutely automatic, it seems to me you are going a little bit too far.



Senator MUSKIE. Let me ask you this. We assume that we are talking about withholding information from the Congress and that we are talking about foreign policy and national security or the desirability of the President to be able to consult in confidence with his advisers. Are there other areas?

Mr. BUNDY. Yes; I think there is one other and that is personnel matters. You may recall that is another of the classic cases, where executive privilege was actually and formally invoked. That was when Governor Harriman, then Secretary of Commerce, refused to reveal to the Un-American Activities Committee the personnel files of Dr. Edward Condon, a scientist who was very much under attack for allegedly leftist views. Then we have the whole sequence of events of the era of Senator Joseph McCarthy where he was riding roughshod over what seemed to be to me a valid executive privilege area of the personnel files and the past behavior of executive employees.

I think there is a very large area of personnel information, and private information of all sorts there. I think one other case that is sometimes invoked is commercially sensitive information where the Government may get information for one purpose which would have a damaging effect on business and it has no business being released for other purposes.

Internal Revenue records are an obvious example of that. So there are other categories where these two, personnel and private information if you will, present a case where you have to look at what you are doing. I don't want to define them precisely, but I am saying they are there.

Senator MUSKIE. Now on this question of the operation of the classification bureaucracy, if that is a proper description of it, last week a spokesman for the Justice Department testified on the new criminal sanctions for breaches of official secrecy. He testified that officials should be prosecuted for disclosing classified information because they had administrative remedies for changing an improper classification on information or for getting information declassified. It was said that review procedures within each agency and since last year through an appeal to the Interagency Classification Review Committee, made it possible for an official to change the secret marking of a document and to carry his case through channels until he won at the highest level, and that that is sufficient protection for him to counter any possible abuses of criminal sanctions.

Mr. BUNDY. I think that is extremely unrealistic to put it mildly, Mr. Chairman. I have not experienced formal declassification procedures and things of that sort described but I think you can guarantee that they would take months and months and they wouldn't be applied nine out of 10 times. You could tie the whole government up with people carrying on that type of an appeal on information that no longer has on the face of it any real significance.

Again I think the British case is in point. The British case released something having to do with Biafra and it was perfectly clear that the information had no title to be classified, but anyway to suppose people are going to spend their time going through review procedures is just nonsense and I think that is another great weakness in the administration's legislation.

Senator MUSKIE. What do you think would happen if some person did that?

Mr. BUNDY. Well, I think he would be regarded as poor promotional material.

Senator MUSKIE. In your testimony you draw what was I think a key distinction between current and historical material. Now our problem is to try to fix that line as clearly as we can and I agree with you that that isn't easy. I wonder about another problem related to that distinction, and that is the problem of the selective access which is given to historical material that remains officially secret. There has been a great deal written about the way favored historians, including, of course, officials writing their own memoirs, can easily get classified files while the outside critics of policy have a much harder time.

Mr. BUNDY. Let me talk to the part I know about. It is true that the Department of State has what it calls an alumni privilege. If you are writing on a past period you are allowed to see the documents you actually saw at the time and no others, but you are allowed to see the ones you saw at the time. But let me clarify one point on which there has been misunderstanding. That access is subject to any use of the material being cleared by the Department. Now I happen to have been doing a little writing in which I had the alumni privilege access, but I didn't try the second part of it, which is whether I can clear this information or any other information which I worked with. This alumni access prevents me from making mistakes, it buttresses the general statements I can make but even those general statements, everything I write as an alumnus who has had that privilege, is subject to clearance though. So it is not very much of a privilege.

When you get into the memoirs of Mr. Bohlen or Mr. Kennan or Mr. Acheson, they are of course dealing with materials from more than 20 years back for the most part. The quotations they have been permitted to make are from documents going back that far, which is usually just a little bit before the comparable volumes of the Foreign Relations of the United States available to all scholars. So that is the alumni situation. It has very careful safeguards in it as contrasted with those who have felt it their privilege to take extensive packages of Government documents with them when they left and for whom I have absolutely no sympathy, none whatsoever. But I think the alumni privilege is in this case at least a reasonable approach to a difficult problem.

Now the other side of the coin is favored access by historians and I think there have been one or two cases—I'm searching my mind as to which they were. Oh, I think in the case of one of the Latin American episodes there is a documented case of a historian friendly to the administration who got access to material on the Dominican intervention. Frankly, Mr. Chairman, I think that was a serious error and I think it is the kind of thing that should not be repeated.

Senator MUSKIE. That was in 1965?

Mr. BUNDY. I am going to spend some of my declining years in working on universal access.

But anyway, let me say as another aspect of the problem, the other day I was talking to a librarian in Princeton who told me with appropriate pleasure that the papers of Secretary John Foster Dulles are now being opened to all scholars in the Princeton library. Secre-



tary Dulles' conception of what were his papers, as opposed to materials the Government has, was remarkably broader than most Secretaries of State. For many years those papers have been subject to privileged access, although access was usually granted to serious and responsible historians. I think the same is true in the Presidential papers area. I venture as another item possibly on the agenda of the commission and possibly we are now getting over to where a whole different commission should look at it, but the ground rules for the Presidential library have to be looked into. They are simply not satisfactory.

To the extent that anybody has privileged access to President Eisenhower's library in Abilene and President Truman's in Independence, President Johnson's in Texas, President Kennedy's in Boston, I think it is an affront to the basic principle of fair access to all historians on the same basis. The fact is that each Presidential library is now writing its own rules and inevitably it will tend to help a little more the fellow who has a little more sympathetic view to a particular President and I think this is something that needs looking into.

Senator MUSKIE. Thank you very much, Mr. Bundy. I could pursue this line of questioning and dig into your experience at much greater length, but we will have access to you again. I am most grateful for the insights you have given us.

[The prepared statement of William P. Bundy follows:]

#### PREPARED STATEMENT OF WILLIAM P. BUNDY

Mr. Chairman, it is a privilege to appear before this subcommittee. Your inquiry into questions of executive privilege, the handling of classified information, and proposed provisions for new criminal sanctions against disclosure of information is an important undertaking.

I do not come before you as an expert on any one of these topics, but solely as a man who served for many years in parts of the government that made use of highly classified information, and was occasionally on the fringe of cases where executive privilege was involved. In the phrase attributed to Professor Powell at the Harvard Law School, I don't know the facts, but I may know something about their significance.

On executive privilege, I testified at some length before a subcommittee chaired by Senator Ervin, in the summer of 1971. Since I understand your present hearing has the full results of that earlier hearing before it, I would prefer not to repeat that statement or my testimony. I have read the transcript over and would stick with it, and am of course available to discuss it further today if the subcommittee wishes.

Your second topic concerns the procedures for classifying information and whether there should be an outside body, independent or attached to the Congress, to review these. This topic, with others, is embraced in Senator Roth's bill, S. 1520, which I believe is before this subcommittee. I have read that bill with care, and support it. Its proposal for a review of classification practices is accompanied by other provisions, including an important one for the review of legislation to protect the security of the United States consistent with the right of the people to full disclosure of information relating to their government. As I read the bill, the proposed Commission could also review the very proposals for new criminal sanctions that have now been proposed by the Administration—and perhaps propose substitutes.

In addition, I understand proposals have been made for some sort of a standing commission to review specific cases where secrecy is invoked by the Executive Branch either vis-a-vis the Congress or vis-a-vis a member of the public requesting information. I am much more dubious about such proposals, frankly, because I think you could be creating a bureaucratic monster that would be likely, in the real world of bureaucracies, to fall rather rapidly to a low level of mediocrity and in the end mess up the problem more than it would help it. A one-shot

commission to go into the whole subject, yes; a standing commission, much more doubtful.

Why the difference? Essentially because I believe the question of secrecy in the Executive Branch must always remain, in the last analysis, one of applied common sense, on the one hand, and of the felt pressures of a free-speaking democratic system, on the other. I don't believe you can legislate good results, or bring them about through a regulatory or arbiter body, however, well-intentioned. Let me come back later in more detail to these basic points, as they apply to the flow of information from the Executive Branch to the Congress, and from the Executive Branch to the public.

These same views lie at the root of my vehement opposition to the changes in the criminal code proposed by the Administration and embodied in S. 1400. I read in the papers that the authors of these proposals claim that they are largely a re-statement of existing law: on a preliminary analysis, I disagree strongly, and believe that the provisions go much too far and should be rejected out of hand by the Congress.

The basic point, as I see it, is that we are dealing not only with the competing interests of two of the three branches of our government, but with the conflict of two national interests—one in the fullest possible disclosure of the government's business, the other in the effective conduct of the Executive Branch, including particularly its conduct of foreign relations and defense. The existence of competing interests between branches and of a conflict of national interests is the essence of the whole question of executive privilege and of the secrecy of national security matters that is usually embraced within it.

Of the first national interest, in full disclosure, I would only say that it is the life-blood of our democracy. In most areas of government, it should be absolutely taken for granted, and in the field of defense and foreign policy it should be the rule rather than the exception, taken into account at every stage and neglected at the peril of the whole underpinning of our actions in these fields. Peculiarly, it is in the end the business of the President—of the decisions and the tone he sets—and it is one of the crucial elements on which the people constantly judge his performance.

But in these two fields, my own area of experience, I do submit that there is a clear national interest in secrecy on many occasions and for periods of time. Thomas Jefferson, in 1807, was categorical that all governments in the history of the world had felt it necessary to do business in secret and to have their executives retain the power to withhold information.<sup>1</sup> I would add that since Jefferson's time and especially since 1940, when the United States assumed world responsibilities (which will continue under any policy), the need for some degree of secrecy has permeated not only defense matters and sensitive dealings with foreign nations, but also a lot of contingency planning deliberations and arguments within the Executive. Nowadays, some people think of this, with the Pentagon Papers in mind, as a nefarious power to plot war in secret. Passing over the question of what Congress and the people knew in that particular case (which was a great deal more than some accounts have suggested), the fact from my long experience is that such deliberations much more often need protection for exactly the opposite reason—to protect the careful framing of courses of action that avoid war and lead to constructive initiatives for peace and world progress. And this often when the public mood is far more belligerent and hostile than the mood of the Executive. The China hands who tried to tell what was happening toward the end of World War II—and whose recommendations might have spared us two wars—needed the protection of secrecy not only then but for some years thereafter: the revelation and *ex post facto* judging of their advice did serious harm to the nation and to world peace, through their ousting from government. Over and over, honest and frank warnings in the chambers of the Executive have led to restraint—warnings which could not have been so honest and frank if it had been thought that they would be divulged at any early time to a public and Congress that included people of violently contrary mind. It bears reminding that the classic case of executive privilege in the Kennedy Administration was Robert McNamara's refusal to give the names of men who had censored presumably somewhat belligerent speeches by senior military officers that were out of line with the President's policy of seeking detente. Command responsibil-

<sup>1</sup> The clearest Jefferson quotation on the subject, for which I am indebted to Prof. Julian Boyd, will be found in the ninth volume of Ford's "Writings of Thomas Jefferson," at p. 57.



ity, yes—as Mr. McNamara took responsibility to the Congress in that case; but revelation of internal deliberations and lower-level advice, no, or at least not at the time. This too is a part of the national interest in both executive privilege and secrecy, and it is not easy to have it both ways. For when there is unauthorized or premature disclosure of executive deliberations, the inevitable result—for good reasons more than bad, but in any event for predictable human reasons—is that the circle of advice is narrowed and its frankness as well. I venture that in the present Administration—not only but in significant part for this reason—internal secrecy and narrowness have been carried almost to the point of absurdity. And serious results I think have flowed from this.

So it is a balancing of interests in the first instance, disclosure versus effective operation. And I would draw a distinction here that must be faced honestly and either accepted or rejected—and I accept it. I believe there is a clear difference between what the Executive is entitled to withhold from the Congress and what the Executive is entitled to withhold from the public. The two, I believe, are not at all the same in our system of representative government. I argued at length two years ago that Congress was entitled—in the areas of foreign policy and defense with which I am familiar—to much more than it was getting, and tried to suggest ways the flow could be improved at both ends of the line. But over and over there are things that can and should be told to the Congress that cannot wisely be revealed to the public—or at least not without significant damage to what can rightly be described as the national interests of the United States. I will not burden the record with cases, but they would be legion.

This is not at all to say that disclosure to the public has been adequate, or that it was adequate during my service in government. But generally speaking the point at which a given issue should be presented to the public, or a decision made known, comes a little after its presentation to appropriate representatives of the Congress. In time alone, and I think also in substance and detail of background, the two are different. I have yet to see a member of the Congressional leadership emerge from the many sessions where the President has discussed a pending decision, and tell all on the steps of the White House. And I think the reason is that in practice members of Congress accept that in their representative capacity they should know things in more detail than the public and know them sooner. Some of their constituents might even say that that is what they are here for.

If one views the matter as a constant balancing of interests, are there subordinate distinctions that help to apply the balance in particular cases? I think there are:

First, there is the obvious distinction between truly *sensitive* matters of great importance to adversary powers, and matters that are *less sensitive*, involving some lesser reason for keeping them secret—like why the F-111 was not awarded to Boeing, or whether the Army spies on SDS.

Next, let us distinguish *current secrecy*—the withholding of roughly contemporary information—from *historical secrecy*, the withholding of information concerning past events. Obviously, the line between the two is not fixed: in an ongoing issue, what is “contemporary” and still of direct relevance may last for some time; on a specific sensitive event, it may evaporate at once—in Dr. Kissinger’s visit to Peking, how he got there had the highest sort of need for current secrecy, none at all for historical secrecy the moment the trip was announced.

Next, I have already referred to an important distinction between *process* and *decision or accepted appraisal*. A piece of this falls within the classic doctrine of executive privilege, and I discussed it at length in my 1971 testimony. Essentially, human beings in any walk of life are franker when they will not be quoted, not only not quoted at the time but often not quoted for some time to come. The strongest advocate of full disclosure of government business to the public has not yet suggested wiring for broadcast the cloak-rooms of the Senate or the discussion chamber of the Supreme Court. The same is true in the Executive Branch, and a large part of what is called executive privilege is simply a common-sense recognition of this fact—a fact as true in law firms, or trade unions, or political parties (or, may I say, primary campaign headquarters), as in public bodies. The distinction is not a flat one or easy to draw—I tried my hand at a rough demarcation in my 1971 testimony—but it is there.

Now if one turned these distinctions into elementary rules, you could come out with the conclusion that the case most entitled to the protection of secrecy is that of *current* information about the *processes* of government, on *sensitive* foreign and defense matters, designed to be revealed to the *public*. Here, if anywhere, is the inner keep of the castle of secrecy which, one would suppose, nothing could breach.

And yet, at once, as my train of thought reached this point, I recalled a vivid case where all four of these apparent principles were breached—and the result was a triumph for the American democratic process. The case was the MacArthur hearings of 1951—wherein current, highly sensitive information going to the heart of the executive process, stopping short only at actual words spoken to the President, was revealed by the pageful of every newspaper in the land, after only the most narrowly defined security screening for information that could quite literally damage American forces in the field.

What was the lesson? First, that the felt sense of the national interest, in its broadest sense, may in a given case override every other factor. If ever a case demonstrated that there are no fixed rules or lines, that one did.

Should one then conclude that the whole concept of secrecy is a nonsense to be discarded? I think not. For the case was unique in both precision and importance. And the great feature of the MacArthur hearings was what deserves to be called due process. The proceedings were intense, but they were conducted by a great Senator with judicial instincts. They were comprehensive—all sides were heard and key witnesses spent days on the stand—but they were at all times fair. In the end, a story had been told that had the most profound effect on the contemporary national temper, both with respect to the firing of General MacArthur and with respect to the accepting of limited objectives in the whole Korean War. It is a story that has also served as a continuing gold mine for historians, to the great benefit of students and others seeking to understand and learn from an important event. Obviously, one of the most tragic aspects of the whole Vietnam experience was the failure, at some appropriate point, to hold comparable hearings—and indeed the mutual defiance of the Executive and the key Senate committee from early 1966 on. I need not dwell on that: the contrast is painfully evident, and it must be bluntly said that the advent of television, and the current ethos about its participation in public events, is a part of that contrast.

Now, of course, the model due process achieved in the MacArthur hearings involved an immense expenditure of effort and talent, immobilizing both the Executive and key committees of the Senate for weeks. And the toughest question of all is how to decide the depth of disclosure compelled in a particular case by the broad national interest. In the MacArthur case, the danger of non-disclosure was so patent that there was at once agreement that the full story should be told at whatever cost, short only of actual risk to the American forces: I have no doubt the transcript was read avidly in the Kremlin and in Peking alike, and that much was learned. But from every standpoint the eventual gains outweighed the drawbacks.

But it is a balance in every case, and the rub is who is to decide. I see no clear answer—except the applied common sense and patriotism of the participants at both ends of Pennsylvania Avenue, aided and guided by the felt pressures of public opinion.

On such questions of balance—the national interest in disclosure versus the national interest in secrecy—criminal sanctions are a crude weapon at best, to be used sparingly. The very decision to prosecute involves the Executive deciding that the balance has been breached—and putting the defendant to great pain and trouble.

Beyond that point, I do not believe the Executive should have a unilateral right to decide key issues at the trial. Sure, it is very tough if the Executive has to drop the prosecution of a valid case because it dare not reveal the extent of the damage done by the disclosure. (This was the case when Attorney General Biddle decided that he could not prosecute the *Chicago Tribune* in 1942 for revealing that our Navy was reading Japanese messages; the very disclosure of the basis of the trial would have compounded the chances of the Japanese learning of it—as by a miracle they did not. Now that type of case is covered by the separate Section 798 of the Code, although the problem of disclosing the basis could still arise.) But it is impossible to rely solely on the Executive determination, without proof. Exactly this kind of thing, in a misguided British prosecution, has led in the past two years to a Royal Commission proposing major modifications in the British Official Secrets Act.

That Act is, of course, a common point of reference to those who would change American practices. I have lived under it, during the war, and watched its salutary impact at a time of felt danger. But the 1972 Franks Report has now made clear how hard it is to apply in present conditions, and as I have read that report I do not see any of its recommendations that could sensibly be carried over to the American situation. That is, I see no specific category of document



that deserves the kind of special treatment now accorded cryptographic material in Section 798—for example, no American equivalent to Cabinet papers (which the Franks Report recommended to be covered by criminal penalties). But, more broadly, an Official Secrets Act is just not in our American style.

So I come back, Mr. Chairman, to where I began. There are no absolutes in this subject, and I would beware of proposals that set them up, either in the criminal code or in the powers of a standing commission. In the end, the Executive-Legislative relation—in disclosure as in all else—will come down at best to statesmanship in both branches, at worst to hard bargaining and give-and-take, and to the felt prestige of each with the sovereign public. I venture that in these last respects the situation has changed somewhat in the period since your subcommittee began its hearings.

Senator MUSKIE. Our next witness is Mr. William G. Florence, Air Force security analyst, retired.

### STATEMENT OF WILLIAM G. FLORENCE, AIR FORCE SECURITY ANALYST (RETIRED)

Mr. FLORENCE. Thank you.

Senator MUSKIE. Mr. Florence, it is a pleasure to welcome you this morning, and will you proceed?

Mr. FLORENCE. Mr. Chairman, I consider it a privilege to respond to the invitation to testify about executive branch policy and practices for declassifying official information.

My comments will also explore actions which Congress could take, first to eliminate excessive secrecy in the executive branch and, second, to provide for safeguarding official information vital to the national defense without abridging the freedom of speech or of the press.

With regard to my qualifications, briefly, I served 22 years in the U.S. Army and the U.S. Air Force, from 1928 to 1950. I served 21 more years with the Department of Defense in civilian status, and retired completely from the Federal Government May 31, 1971. For the last 26 years of my service, my duties involved the development and application of policy for classifying and declassifying official information.

Since May 1971, my activities here included service as security consultant to Government contractors and to others interested in matters involving national defense considerations. I have been associated with the defense counsel in the Ellsberg-Russo Pentagon Papers case, since October 1971, as their consultant on Government security policy.

Mr. Chairman, secrecy in the executive branch of the Federal Government continues to be one of the most serious problems of our time. There is abundant proof that the false philosophy of classifying information in the name of national security is the source of most of the secrecy evils in the executive branch. The insistence of people in that branch on operating under security classification secrecy has created a state of antagonism between them and the American public.

The Ellsberg-Russo trial is only one example, although the most noted in history, of how the classification theory affects executive branch attitudes and actions. About 3 days after publication of the Pentagon papers volumes began in June 1971, I heard the announcement of the President's comment indicating his belief that the mis-handling of material classified top secret was a basis for prosecution. Twelve days later, a grand jury returned the first indictment against Dr. Ellsberg, alleging unauthorized possession and retention of documents classified top secret. In December 1971, 6 months later, that indictment was expanded to charge conspiracy between Dr. Ellsberg

and Mr. Russo to defeat an alleged governmental function of controlling the dissemination of classified Government studies, reports, memorandums, and communications.

Available facts that show that the existence of security classification markings on the Vietnam study volumes published by the New York Times, constituted the only excuse that could be found to prosecute Dr. Ellsberg. Much of the outline of so-called proof in the Government's trial memorandum is filled with slanted citations of administrative regulations, rather than law. During the trial, and until I testified a few weeks ago, the prosecutor insisted that the Executive order on classifying and safeguarding information actually was law. In my opinion, if those outdated and unjustifiable security classification markings had not been on the Vietnam study volumes, there would never have been any prosecution stemming from their release.

Another example of how much the executive branch treasures the power that is inherent in security classification secrecy, is contained in the proposed Criminal Code Reform Act of 1973, which is designated S. 1400. The Department of Justice would have Congress really make it a crime to disclose information bearing a classification marking. Individuals would be subject to the prosecution regardless of how much the country benefited from the disclosure. They could be found guilty solely on the basis that they used the information in a manner not approved by the classifier, even though the information had no relationship whatsoever to the national defense.

Mr. Chairman, the policy for classifying information as confidential, secret or top secret is contained in Executive Order 11652, March 8, 1972, subject: "Classification and Declassification of National Security Information and Material." Additional instructions are in a National Security Council directive, May 17, 1972, which governs the classification, downgrading, declassification, and safeguarding of national security information. And, of course, executive branch departments and agencies have their own implementing regulations.

Basically, the policy in Executive Order 11652 is the same that the Army and Navy used before World War II to classify a very small volume of military information as confidential or secret. That policy was first given Executive order status in 1951, No. 10290. Revisions issued in 1953 as No. 10501 and last year as No. 11652 have continued to authorize the withholding of official information from American citizens as an administrative choice of many thousands of executive branch employees.

History proves that the administrative classification system does not serve the interests of our country today. As soon as the system was stretched beyond its original military purpose and was used to cover the burgeoning bureaucracy that sprang up in World War II, overclassification became common practice.

Elmer Davis, the Director, Office of War Information, attempted in September 1942 to eliminate unnecessary classification of information. Later, Executive Order 10290, which had existed for only a couple of years, was replaced because people classified too much information that did not qualify for protection in the interests of national defense. Executive Order 10501 was replaced last year because, as the President said, the system allowed too many papers to be classified for too long a time.



Executive Order 11652 has been in effect for about a year now. The policy being substantially the same as that which has existed for generations, "too many papers are being classified for too long a time."

Executive Order 11652 is a failure for at least three reasons.

First, the threshold criteria for classifying an item of information is exceedingly broad. The only constitutional basis for restricting the dissemination of information is the need to preserve our national defense capability, according to the Supreme Court. But the Executive order authorizes withholding of information if an official or employee thinks that its unauthorized disclosure could reasonably be expected to cause damage to the national security. The national security standard, as opposed to national defense, is all inclusive. It encompasses economic, financial, industrial, health, and agricultural factors as well as many others.

In practice, people classify information for the most part with no idea whatever that its disclosure could harm any interest of the country. Reasons most commonly used by individuals for classifying information are—

1. Newness of the information;
2. Keep it out of newspapers;
3. Foreigners might be interested;
4. Don't give it away—and you hear the old cliché, don't give it to them on a silver platter;
5. Association of separate nonclassified items;
6. Reuse of old information without declassification;
7. Personal prestige; and
8. Habitual practice, including clerical routine.

One research corporation that is under contract to the Department of Defense stated last month that the only effect Executive Order 11652 had on its classified work was the expenditure of over \$4,000 for rubber stamps to reflect new notations such as the exemption of information from automatic declassification.

The second major problem about Executive Order 11652 is that it permits people to classify information without being designated to exercise such responsibility. The highly publicized reduction in the number of authorized classifiers has had little effect. Masses of officials continue to classify information without being authorized to do so. They simply cite some so-called classification guide, the provisions of some regulation, or the name of another person having classification authority.

If I might, I would just digress a moment. I have an example of one of these classifications guides we have been referring to that people use as a basis for assigning a classification on a document. Included are instructions that actually authorize the concept of classification, with no real specificity as to its need. Individuals can decide that they have information which conceivably falls within the concept of this guide. They can then cite the guide, and go about their merry way of classifying information as fast as they can.

Senator MUSKIE. May we have that for the record?

Mr. FLORENCE. You may, Mr. Chairman. This is not a current one, but I think it is an example that could be useful.

Senator MUSKIE. Without objection, that will be included in the record.

[See "Air Force Systems Command Security Classification Guide," Appendix, Volume III of these hearings, Secrecy in Government, Part 1, Classification Guide.]

Mr. FLORENCE. The third major reason why Executive Order 11652 is a failure is that it does not declassify or require the declassification of information on a timely basis. Of course, the order urges timely declassification. But it permits easy exemption from declassification for at least 30 years. It is common practice for entire projects and extensive programs to be exempt from automatic declassification.

In reality, there seems to be something special about a classification marking, once it gets placed on a document. It becomes virtually sacred. Some people would almost as soon give up their birthright as to cancel the classification marking on information.

I will cite an example. There are 20 documents in evidence in the Ellsberg-Russo trial which the defendants reproduced in 1969. Half of them are still classified top secret, even though they automatically became public records when the prosecution introduced them into evidence. The judge specifically ruled that all material introduced as evidence is public, and that the still-classified documents are available to anyone.

I have a copy of one of those documents that is under a separate court order which applies to me, so I can't turn it over to the chairman. But I did think you would be interested in seeing a copy of a public document that is still classified top secret. This is only one of the documents I was referring to as being public records in the trial.

The Department of State has primary interest in at least six of the top-secret public documents, including a partial history of the 1954 Geneva Conference regarding Indochina. The Department of Defense has primary interest in the other top-secret public documents, including a comparatively brief account of the deployment of Marines to Da Nang, South Vietnam, in 1965. Both departments have repeatedly refused to cancel the classification markings assigned to their respective documents to this day.

Mr. Chairman, we are concerned with the need to resolve serious problems in our Government, and in the life of this Nation, which stem from administrative security classification abuses by people in the executive branch. Normally, when Congress finds that action by the executive branch should be corrected or redirected, it simply revokes or changes the law that permitted the problem to arise. But the case of administrative classification excesses is different. There is no authorizing law that could be revoked or changed.

The only way that Congress can impose effective control over classification secrecy in the executive branch is to enact a new law. I have often heard it said, "You cannot legislate against stupidity." But, in my opinion, that is precisely what Congress must do, and it should be done as soon as possible.

The most suitable legislative action would be the enactment of a law to accomplish the basic purpose of Executive Order 11652, and at the same time serve the interests of Congress and the people regarding access to information. It is my belief that a bill should be enacted to do the following:

(1) Establish precisely the authority for the President and the heads of a few specified departments and agencies to designate certain official information as requiring protection against disclosure, so as to preclude actual damage to the national defense. The law would not force



the designation of any information as requiring protection. But if an item of information is considered for designation, the procedures and restrictions would apply and be controlling within the executive branch.

(2) Prescribe use of the single term "Secret Defense Data" for such information as may be designated for protection. No other classification would be permitted, but routing designators could be used to assist in restricting the distribution of specific items of information.

(3) Define as narrowly and clearly as practicable the criterion "would damage the national defense." Efforts in the past to define types of information requiring protection have always failed. As reflected in our espionage laws, it is injury and damage to the national defense and to the United States that we are concerned about.

(4) Impose strict limitations on authority to designate information as "Secret Defense Data." Only the head of an agency or an official designated by him could make the designation. His name and title would appear on documents containing the information.

(5) Set practical limits for retaining information in the secret defense data category, which would reflect the need to eliminate the current fiction about how this Nation would be harmed if its citizens should learn what the executive branch is doing and has been doing in the name of national defense.

(6) Establish a specific standard for dissemination within and by the executive branch of secret defense data. This would reflect the responsibility of the executive branch itself to protect the information it considers important. That branch should not operate on the basis that it can make wide dissemination of classified information on the expectation that recipients would become subject to prosecution if they don't agree with the executive branch ideas about security controls. A vitally important provision would make it unlawful for any person to withhold or authorize the withholding of information from the legislative branch on the basis of its qualification for designation as "Secret Defense Data."

(7) Direct that an official with appropriate staff be designated by the President to assist him in monitoring implementation of the law. A report of the various actions taken would be submitted to Congress semiannually.

Mr. Chairman, I do have a suggested draft of my ideas in this regard if that should become of interest to the committee.

Senator MUSKIE. Yes; we would be happy to have that for the record. That will be placed at the end of the statement.<sup>1</sup>

Mr. FLORENCE. Mr. Chairman, I have reviewed two existing bills which are under consideration.

First, S. 1142, would amend the Freedom of Information Act to permit a Federal court to determine whether disclosure of an official record would be harmful to the national defense or foreign policy. I would strongly support that legislation. One of the objectives I had in mind for legislative action to replace the Executive order classification system was to provide a basis for judicial review of a classification pronouncement if it should become involved in litigation.

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<sup>1</sup> See p. 293.

In my opinion, citizens urgently need relief from the tyranny of classification secrecy as practiced by the executive branch. The judiciary could give us that relief. I am confident that a Federal court would exercise good judgment about our national defense requirements in any given case. I would assume that the judge could handle any foreign policy case quite satisfactorily.

Here is an additional amendment to the Freedom of Information Act that could be included in S. 1142. I suggest adding the following to subsection 552(b) (1) of the act:

*Provided*, That the agency record involved, other than atomic energy restricted data and communications intelligence, is less than 3 years old at the time its disclosure is requested.

The change would eliminate Executive order protection for such records after 3 years. Experience indicates that 3 years is the limit of protection time for most information. Of course, additional listings of especially important information such as intelligence operations could be included in the exceptions.

The other bill, S. 1520, would establish a commission to study laws, rules, regulations, and so forth, relating to the classification and protection of information. Briefly, the commission would determine which of such laws, rules, and regulations, are necessary and appropriate, and would make specific proposals about them. One proposal might be legislation to preserve and protect the security of the United States in a manner consistent with the right of the people to full disclosure of information relating to their Government.

I would not favor setting up any separate commission to explore the problem of administrative overclassification of information in the name of national security, or the denial of information to the people of this country. The objective of the bill, national defense consistent with our constitutional right of free speech and a free press, most certainly merits the support of everyone. That is the purpose of the type of legislation that I have suggested.

The responsible committees in Congress are fully capable of determining what action should be taken about the problem of classification excesses, our national defense interests, and our first amendment rights. Since corrective action can be taken only by the Congress, I respectfully ask that it get on with the job.

Mr. Chairman, I express my deepest thanks for the invitation to come here and present these comments and suggestions.

Senator MUSKIE. Well, thank you very much, Mr. Florence, for your statement. I have just a few questions.

In trying to draft legislation to control official secrecy practices, we constantly run into the problem of how long a secret really stays a secret. Dr. Edward Teller says scientific secrets last only 1 year. In last year's Executive order the administration appears to think that 10 years is necessary to protect most material. You used the figure 3 years for that. What are the advantages or drawbacks of putting a fixed time limit into the law?

Mr. FLORENCE. The advantage, Mr. Chairman, is a congressional reflection of an objective. Now, an objective, of course, has no force unless it is made forceful. The 3-year choice as an objective could be made forceful with exceptions. For example, I do recommend the possible revision of the Freedom of Information Act to eliminate protection of information after 3 years, but with exceptions.



Now, it is my personal experience that the time limit suggested by Dr. Teller is a practical time limit in many, many cases. Secrets are really not secret, Mr. Chairman. They are known by people. Within the passage of a year's time the operational use of information involves spreading knowledge of it. I do believe the good doctor is correct that a great amount of information does not lend itself to protection after a year. But Congress, in looking at all of the interests of the country focused through the operation of the Government, would want to assure a practical choice and use an objective that would apply to really the major part of our lives.

So 3 years takes into account initial use of information, it takes into account the responsibility of the executive branch to declassify information as soon as possible anyway, and simply puts as a last resort a practical time limit.

Senator MUSKIE. Would you give the CIA a blanket exception?

Mr. FLORENCE. Absolutely not. Pardon me, sir, did I interrupt your question?

Senator MUSKIE. No; you got the thrust of the question.

Mr. FLORENCE. Well, I have seen in past examples, many representations that whatever CIA would consider as their operational interest, should not be subject to congressional control, let alone citizen control. This to me is utter fiction. To begin with, I believe that Congress might be questioned as to why it permitted the inclusion or why it did include a position in the National Security Act of 1947 indicating that the Director of CIA had some special responsibility for safeguarding CIA information.

I think, stemming from that natural responsibility of his, having been put in law, the theory of CIA secrecy has been expanded way, way beyond any practical limits.

Not only is there no reason for the CIA to have special treatment as an operating part of our country, but the second reason why I would say the CIA should not be exempt from regular declassification requirements is that the operations it is engaged in are the very type of operations that we should know about.

I have had occasion to be made privy to some of those operations, under court orders, so I can't discuss specifically the particular ones I have in mind. But we do read in the newspapers of the CIA practicing its own private wars for private programs and private engagements. The information is of importance only to the people engaged in those programs and projects. I repeat again, Mr. Chairman, those activities are the very ones that this country should know about and decide whether we want them carried out. Many of them, I believe, lead to complications between our country and other countries that we are constantly having to try and resolve.

Senator MUSKIE. In establishing review procedures, how do we get around the argument that the volume of classified material is unmanageable for any purposes? For example, the State Department in 1971 said that it handled 281,000 classified papers for a year and has 37,500,000 classified papers in its files. How could anyone review so much material, in your judgment?

Mr. FLORENCE. They can't do it, Mr. Chairman. I would urge consideration of two factors that we are all discovering and exploring at the moment.

First, the volume of material stems from these abuses that we are talking about today. The permission of people to use classification stamps with no discretion creates volume. We are faced with volumes of hundreds of millions of pages and tons of documents, and it is rising astronomically.

The way to deal with the volume of material is by a command determination, whether exercised by the President or by the Congress, that that material no longer requires protection represented by classification marks. We have the experience of declassification by Executive directive. We can adopt the same principle by enactment of law.

I personally was the one responsible in the Department of Defense in generating a directive in 1957 that eventually was published in 1958. With the Secretary of Defense's signature on this directive, he personally removed the authority for the classification markings to be on any information having originated prior to a certain date. In that case, it was January 1, 1946. There would have been no way in the world, as long as we lived, to have accomplished declassification of that information by individual review of documents. It is unthinkable to pursue any such solution.

In that instance, the declassification was simply exercised by a command decision such as the Executive order represents. It said, "Cancel the classification."

Now, this is what Congress would do if it amended the Freedom of Information Act by requiring the application of the act to information after it became 3 years old. That would be a legal canceling of classification representations on information over 3 years old.

Senator MUSKIE. But it would be subject to exceptions?

Mr. FLORENCE. Oh, yes. There must be exceptions.

Senator MUSKIE. With respect to this volume of material in the past, how do you apply the notion of exceptions to wholesale declassification? You have 160 million pieces from World War II minus 29 million if that is your figure. This means 132 million or 131 million pieces. Would it be safe to declassify all of it with the stroke of a pen?

Mr. FLORENCE. Yes. But I think your question leads to this comment. The two types of information I mentioned, and any additional exceptions Congress might specify, would be immediately identifiable. Custodians would know where the excepted information is. It would not become subject to any compromise as a practical matter.

Now, theoretically—and I heard the President's quote on this point—maybe some one document might have gotten misplaced and, theoretically, might be subject to compromise. Well, I can't imagine any of us feeling any harm, compared with the massively greater benefits that would result to this country by the removal of false secrecy restrictions from those 160 million pages, Mr. Chairman, that you were talking about.

Senator MUSKIE. Now, if we accept the idea that secrecy for a 3-year period is tolerable, should we then be ready to approve criminal sanctions against those who violate that by leaking material less than 3 years old?

Mr. FLORENCE. Absolutely not, Mr. Chairman. My major effort in presenting possible solutions to this problem to the Congress is to assure that there is always a clear distinction between (1) an administrative act directed toward secrecy, and (2) the question of



culpability on the part of some individual under criminal law. These two factors have got to be kept so far apart that there can never be any overlapping of them.

Secrecy on the part of the executive branch should be their responsibility and theirs alone. If information that we would permit them to hold secret, under very strong restrictions, should spill out of the executive branch and come into the possession of a Senator or someone else, as a private citizen, he has no responsibility to the President for that mistake. His responsibility is to the country. And if the information that has come into his possession is suitable to add to the knowledge of our country, it is his responsibility as a citizen to use it in that way.

As for criminal sanctions, it is up to the Congress to determine what would hurt this country. I am not talking about embarrassing some administrative official including the President but what would really hurt this country and what should be punished as a deterrent to any future hurt. That is a very, very narrow action as opposed to all of this administrative worry we are hearing about.

Let me add one more point. I couldn't be more forceful on this. A classification action is strictly a matter of mind. Under a declassification law, a person in the executive branch would be permitted to decide in his mind, whether an item of information should be safeguarded.

But to suggest that because of a thought in that individual's mind, somebody else should be made a criminal, this is utterly abhorrent. We must keep these two factors separate.

Senator MUSKIE. Thank you very much, Mr. Florence, for your excellent statement. We appreciate your willingness to come here today.

Mr. FLORENCE. Thank you, sir.

[A bill proposed by William G. Florence follows:]

#### PROPOSED "NATIONAL DEFENSE DATA CLASSIFICATION ACT OF 1973"

A BILL (PROPOSED), to define and provide for designating certain official information as requiring protection in the interests of national defense, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SHORT TITLE

SECTION 1. This Act may be cited as the "National Defense Data Classification Act of 1973."

#### POLICY

SEC. 2. The authorization in this Act for the President and specified departments and agencies of the Executive branch to safeguard certain official information as requiring protection in the interests of national defense and the standard established in this Act for the use of such information, including its dissemination to the Congress, are consonant with:

(A) The provisions in the United States Constitution that Congress shall make no law abridging the freedom of speech or of the press;

(B) The right and essential need of the Congress and the citizens of the United States to be informed concerning the activities of the Executive branch; and

(C) The interests of national defense which require preservation of the ability of the United States to protect and defend itself against hostile or destructive action by covert or overt means, including espionage as well as military action, but which also reflect broad dedication of the Federal

government with commensurate interchange of information in and outside the country involving legislative action, foreign relations, industrial and economic development, international trade, and social endeavor as well as conventional military functions.

#### DESIGNATION OF NATIONAL DEFENSE DATA

SEC. 3. (A) (1) Official information originated or acquired by an Executive branch department or agency as listed in Section 4, the unauthorized disclosure of which *would* damage the national defense *may* be classified and designated as being in the category of Secret Defense Data.

(2) The criterion "would damage the national defense" shall apply to information the unauthorized disclosure of which would adversely affect the ability of the U.S. to protect and defend itself against hostile or destructive action by covert or overt means, including espionage as well as military action. The criterion shall not include or apply to information the disclosure of which would or could reveal political or other embarrassment on the part of any department or agency of the U.S. or any official or employee of the United States.

(3) Except as otherwise provided in law, no other designation shall be used to classify information as requiring protection in the interests of national defense: *Provided* that the President or the head of a department or agency originating or receiving Secret Defense Data may use such routing indicators as might be appropriate to assist in limiting the dissemination of individual items of such information to designated recipients; and *Provided further*, that nothing in this Act shall be interpreted as requiring release to the public of any information relating to the national defense or as having any effect on statutes applying to protecting, handling, copying, obtaining, communicating or disclosing official or unofficial information relating to the national defense.

(B) For the purpose of this Act, "*would* damage the national defense" as used in subsection (A) (1) shall include the following:

- (1) Disruption of foreign relations *affecting* the *national defense*;
- (2) Compromise of a current contingency plan or operational plan for the defense of the United States against armed attack;
- (3) Compromise of a current intelligence plan or operation important to the national defense;
- (4) Compromise of an official cryptologic system vital to the national defense;
- (5) Disclosure of official information regarding a technological development primarily useful for military purposes which disclosure in itself would eliminate a known technological lead-time of the United States vital to the national defense, *Provided* that the Secret Defense Data designation shall not include basic research or information resulting therefrom; and
- (6) Disclosure of official information which disclosure in itself would make a current military weapon system or military operation vulnerable to successful hostile attack or other successful countermeasures, *Provided* that the Secret Defense Data designations shall not apply to information necessarily exposed or otherwise disclosed by the existence or operation of a weapon system or military unit, or to routine movement, training or support of military units *not engaged in combat or combat-related operations*.

#### AUTHORITY TO CLASSIFY

SEC. 4. (A) The President and the head of only the following departments and agencies may exercise authority for classifying official information as Secret Defense Data:

- (1) Such offices in the Executive Office of the President as the President may designate in writing;
- (2) Department of State;
- (3) Department of the Treasury;
- (4) Department of Defense;
- (5) Department of the Army;
- (6) Department of the Navy;
- (7) Department of the Air Force;
- (8) Department of Justice;
- (9) Department of Commerce;
- (10) Department of Transportation;



- (11) Central Intelligence Agency ;
- (12) Atomic Energy Commission ;
- (13) National Aeronautics and Space Administration.

(B) The head of a department or agency having classification authority may designate in writing such of his deputies, assistants and other subordinates as he deems necessary to exercise authority for classifying official information within their respective functional responsibilities according to this Act, *Provided* that a person who copies or otherwise reproduces or uses information already designated as Secret Defense Data shall not require classification authority to put the designation on material containing the information and shall not be delegated classification authority for that purpose.

(C) Each person designated in a department or agency to exercise classification authority shall be furnished with written instructions advising him of the subject matter which he may classify and of such other requirements as shall apply to him in exercising his classification authority.

(D) The head of an office in the Executive branch who is not designated to exercise classification authority under this Act but who originates or supervises the origination of official information believed to qualify for designation as Secret Defense Data may recommend classification by the person or office having both a direct official interest in the information and the authority to classify it.

#### CLASSIFYING INFORMATION

SEC. 5. (A) The Secret Defense Data classification may only be applied to official information which specifically qualifies for classification according to Section 3 and which is assigned the Secret Defense Data classification by an official designated in or according to Section 4.

(B) An item of information, including information contained in a document or other material object, shall be considered for classification according to what it reveals and not according to its relationship to other information, and no document or other material shall be classified unless it contains or reveals an element of official information specifically designated as Secret Defense Data according to this Act.

(C) A routing designator may be assigned to Secret Defense Data at the time of or subsequent to classification so as to identify it as being subject to specified administrative restrictions on reproduction and dissemination.

(D) A document or other material object, including communications transmitted by electrical means, containing or revealing information designated as Secret Defense Data according to this Act shall be appropriately and conspicuously marked or otherwise identified to show the following :

- (1) The marking "Secret Defense Data" ;
- (2) The routing designator if one was assigned ;
- (3) The office of origin ;
- (4) The date of origin ;
- (5) The classification authority by name and title ; and
- (6) The date of original classification of the Secret Defense Data.

(E) In addition to other required markings, each document designated as Secret Defense Data shall also contain a meaningful statement identifying the information which requires protection so as to permit other information to be used without the encumbrance of classification, or each separate paragraph and other separate segment shall be marked to show whether it contains Secret Defense Data.

#### DECLASSIFICATION OF SECRET DEFENSE DATA

SEC. 6. (A) When information designated as Secret Defense Data no longer requires protection against unauthorized disclosure to preclude damage to the national defense or no longer could reasonably be protected against unauthorized disclosure it shall be declassified by the official who assigned or authorized the classification, by a successor in office, or by a higher supervisory official.

(B) The head of an office which has responsibility for functions transferred from another office shall exercise declassification authority for such Secret Defense Data as falls within the purview of the transferred functions, and shall designate one or more officials to accomplish declassification as required by Subsection 6(A), *Provided* that when an office ceases to exist and there is no transfer of functions to another office, such Secret Defense Data as remains shall be transferred to the General Services Administration and that agency shall exercise declassification authority.

(C) Declassification of Secret Defense Data shall be accomplished by issuance of an official announcement describing or otherwise identifying the information involved, or by the declassification authority authenticating the declassification according to subsection 6(F) on the record copy of a document and notifying holders of copies of the document that the information has been declassified.

(D) Information designated as Secret Defense Data which has not been declassified by the President or a department or agency as provided in Subsections 6(A)–(C), and which is not covered by statute, shall automatically become declassified *two* years from the end of the month of original classification, regardless of whether documents or other material objects containing or revealing the information are marked to show the declassification, *Provided* that a later date may be designated as follows for the declassification of information deemed to be of such importance and sensitivity that continued protection should be permitted as indicated to preclude damage to the national defense as defined in Section 3(B), and *Provided further* that any information assigned a deferred automatic declassification date shall be subject to non-automatic declassification at any time:

(1) Subject to restrictions *prescribed by the head of the department or agency*, the classifying official may designate a declassification date for an item of information not later than *four* years from the end of the month of original classification:

(2) The *head* of a department or agency may designate a declassification date for an item of information not later than *eight* years from the end of the month of original classification; and after the seventh year of classification of an item that would compromise a *current intelligence operation or a cryptologic system vital to the national defense*, he may sign an order deferring declassification until a date not later than 12 years from the end of the month of original classification.

(E) The head of an office or other person having custody of a Secret Defense Data document or other material object which he believes no longer requires classification and concerning which he does not have declassification authority may recommend immediate declassification by the classifying official or by higher authority as appropriate, *Provided* that extracts from a document which the custodian knows do not qualify for designation as Secret Defense Data may be used as non-classified information without referral for declassification.

(F) The holder of a document or other material object containing information bearing the Secret Defense Data designation but which has been declassified, including items automatically declassified, shall line through or otherwise cancel the classification marking as soon as practicable and annotate the item to show the date of and authority for declassification by name and official title or by citation of such official announcement as was made, *Provided* that material in storage need not be marked or annotated until it is withdrawn for use, and *Provided further* that material containing declassified information which is designated for destruction need not be marked to show declassification and may be destroyed according to procedures applicable to other non-classified material.

#### STANDARD FOR DISSEMINATING SECRET DEFENSE DATA

SEC. 7. (A) The standard for dissemination of Secret Defense Data within or by a department or agency shall be as follows, *Provided* that no person may withhold or authorize withholding information or material from the legislative branch on the basis that it is designated or qualifies for designation as Secret Defense Data: "Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such knowledge or possession in the interest of promoting national defense."

(B) The term "official duties" shall include functions or services of persons performed in the accomplishment of official programs or projects or other official tasks regardless of whether they are officers or employees of the United States, *Provided* that nothing in this Act shall be interpreted as authorizing the dissemination of an item of Secret Defense Data to any person deemed incapable or not trustworthy enough to accord the item the degree of protection needed.

#### IMPLEMENTATION AND REVIEW

SEC. 8. (A) The President shall promulgate through the National Security Council or otherwise such regulations as may be appropriate to implement and carry out the provisions of this Act. The regulations shall be promulgated not



later than 30 days prior to the effective date of this Act and shall include the following policy areas:

(1) Prohibition against designating or keeping information designated as Secret Defense Data which has already been exposed or which cannot be protected effectively from exposure or other disclosure while in use, or the *unauthorized disclosure* of which would not *in itself* damage the national defense;

(2) Limitations on assigning or retaining the Secret Defense Data designation on information which necessarily must be disseminated or used outside the Executive branch, and also a statement of the conditions for permitting the dissemination or use of Secret Defense Data by contractors and others outside the Government;

(3) Procedures for marking Secret Defense Data material and declassified material;

(4) Maintenance of accountability records for each item of Secret Defense Data originated by or for a department or agency until at least two years after destruction or loss of the item, or until it has been declassified;

(5) Limitation on the reproduction of Secret Defense Data documents, including the initial production of them;

(6) Protection of Secret Defense Data against unauthorized disclosure while in use, transit or storage;

(7) Destruction of Secret Defense Data material when it no longer is needed, and methods of destruction;

(8) Conditions for permitting retention of the Secret Defense Data designation on documents transferred to records repositories; and

(9) Administrative action to be taken against *officers and employees of the Executive branch* who violate provisions of this Act and implementing regulations.

(B) The President shall direct that the National Security Council monitor the action taken by departments and agencies to implement and adhere to the provisions of this Act and the regulations promulgated by the President. To assist the National Security Council, an official with appropriate staff shall be designated to perform the following functions:

(1) Obtain and review departmental and agency implementing regulations and those of such subordinate components as may be necessary to determine the effectiveness of departmental action;

(2) Make inquiries on a periodic basis regarding the need for assignment or retention of the Secret Defense Data designation on selected documents and other material;

(3) Conduct visits on a periodic basis to observe the practical application of classification and declassification policy by officers and employees of departments and agencies and the safeguarding of Secret Defense Data;

(4) Receive and respond to suggestions and complaints from persons in or outside the Government regarding the implementation of this Act by departments and agencies, and in consultation with departments and agencies involved, assure that corrective action is taken as appropriate;

(5) Recommend that action be taken by the National Security Council or the President when necessary to assure that departmental or agency action conforms with the provisions of this Act and the President's implementing regulations; and

(6) Render a report April 1 and October 1 each year to the National Security Council showing the significant actions taken during the reporting period and the results of inquiries and visits conducted, *Provided*, that a copy of the report as approved by the Council shall be submitted to the President of the Senate and the Speaker of the House of Representatives, U.S. Congress, not later than 30 days after the end of the reporting period.

#### EXISTING CLASSIFIED INFORMATION

SEC. 9. (A) Official information originated or acquired by a department or agency and carrying the classification designation "Confidential," "Secret" or "Top Secret" shall be subject to the restrictions and other provisions of this Act regarding the designation of information as requiring protection in the interests of national defense and the use and declassification of such information as qualifies for the Secret Defense Data designation, *Provided* that prior to the effective date of this Act the President or the head of a department or agency may designate in writing specific types or items of information as qualifying

for designation and protection as Secret Defense Data regardless of whether they are marked as such, and may designate or authorize the designation of deferred automatic declassification dates for such items according to Section 6(D).

(B) Subject to review procedures established by the head of a department or agency, the officer or employee having custody of a Confidential, Secret or Top Secret document or other material object in use or withdrawn from file or storage for use shall mark it to show that it has been designated and continues to qualify for designation as Secret Defense Data, or he shall mark it to show that it has been declassified and cite this Act as the authority for such marking unless declassification was accomplished before the effective date of this Act.

#### ATOMIC ENERGY RESTRICTED DATA

SEC. 10. This Act shall not affect any requirement made by or under the Atomic Energy Act of August 30, 1954, as amended, regarding the designation and protection of Restricted Data as defined in that Act.

#### FOREIGN CLASSIFIED INFORMATION

SEC. 11. (A) Information or material originated and classified by a foreign government or international organization and furnished to the President or a department or agency of the Executive branch under conditions involving protection in the interest of mutual defense may be accorded protective use under regulations promulgated by the President or the head of the department or agency, *Provided* that no person may withhold or authorize withholding from appropriate Congressional committees such information or material on the basis of the assigned classification or any contrary agreement imposed by a foreign government or international organization.

(B) Any classified information received from a foreign government or international organization which qualifies for designation as Secret Defense Data may be so designated and handled according to the provisions of this Act.

#### EFFECTIVE DATE

SEC. 12. The effective date of this Act shall be the first day of the fourth month following the month during which it was enacted.

Senator MUSKIE. We will recess until 2 o'clock this afternoon.

#### AFTERNOON SESSION

Senator MUSKIE. The first witness this afternoon is Dr. Earl Callen, professor of physics, American University.

Dr. Callen, it is a pleasure to welcome you here this afternoon.

#### STATEMENT OF DR. EARL CALLEN, PROFESSOR OF PHYSICS, AMERICAN UNIVERSITY

Dr. CALLEN. Thank you, Senator. I am delighted to be here. Shall I begin, sir?

Senator MUSKIE. Yes; won't you proceed please?

Dr. CALLEN. I am very grateful for the opportunity to be here to discuss certain problems encountered by scientists in connection with access to Government records.

#### I. THE "NEED TO KNOW"

(A) Subsection (a) (3) of the Freedom of Information Act provides that "any person" is eligible to obtain Government records. The Federal agencies and in some instances, the courts have attached a "need to know" qualification to obtaining access to public files, although



the plain wording of the act, and its legislative history, do not support such an interpretation.

The concept of "need to know" is that certain material should be generally restricted in distribution, and released only to those who can demonstrate that they have valid reason for seeing it. Standards for "need to know" are not well-defined nor is satisfaction of those standards easily established.

Must one's ability to earn a living be conditional upon access to the material requested? If pecuniary interest is too strong, that might even be used by a Federal agency to turn down a request for information.

In one instance, a request was denied by the Army because the information "could be used improperly to the advantage or the detriment of private interests \* \* \*"

If such an interpretation prevailed, the scientist or engineer working in an industrial research laboratory could be denied access to government technical material because of its commercial value.

(B) For the scholar, researcher or teacher, job-related "need to know" can be a vague and difficult standard. For a particular study, the researcher may very much desire or even require access to government records, but he can rarely claim that working on one particular study rather than on another is crucial to his job. He usually chooses a subject because he is interested in it, he has an idea, or thinks he can make a useful contribution to public knowledge. A request for access might be motivated only by the hope that careful scrutiny of government records might reveal something worth following up. It would be hard to demonstrate that this undefined scholarly motivation is a compelling "need to know." Yet great scientific advances have hinged on studies so tentatively begun.

(C) For scientists, as well as humanists and artists, the creative process is often nonlogical and intuitive. One doesn't know in advance from what source inspiration will come, or what already discovered technique will unexpectedly turn out to be the tool one needs to do the job. In other words, one doesn't know whether one needs to know something until one knows it.

Here is a current example from my own research. I work in the theory of solids, especially the magnetic properties of solids. For a year I have been puzzling about how to apply certain ideas of cooperative phase transitions, which occur in magnetism, to imitative social and biological systems. The analogy is clear, but there are serious difficulties connected with nonconservative systems. Then I chanced upon a new treatment of laser theory, likening the behavior of a laser near threshold to a phase transition. The laser is an open, nonconservative system. Atoms and energy stream in and out. Here was the tool I needed. A new technique developed for quantum electronics allowed the application of ideas of ferromagnetism to the imitative behavior of animals social systems.

But I had no way of knowing this when I read about lasers. I have read many papers on many subjects during the past year, and it is only after the fact that I can now say which of those I "need to know." Had the laser work been classified—as much of it indeed is—I would never have discovered it.

(D) Differential access. Another problem with "need to know" is that this vague standard is liable to abuse through discriminatory dif-

ferential access to governmental records, granted to those whose views are favorable to the position of the government, but denied to potentially hostile critics.

In an address to the American Physical Society in April of this year, John Shattuck, ACLU staff counsel, told of the case of Jeremy Slater, a Latin American expert sympathetic to the U.S. intervention in the Dominican Republic who, in his writings, acknowledged that the State Department allowed him to examine its file on the affair. Yet Prof. Theodore Draper, an equally well-known Latin American scholar, but one who has written critically of our intervention in the Dominican Republic, has been denied access to the files.

Max Frankel, in his affidavit in the *Pentagon Papers* case, and in *Columbia Journalism Review*, September/October 1971, recites dozens of examples of selective access granted to friendly reporters, to secret and top secret materials.

## II. SELECTIVE RELEASE AND SELECTIVE DECLASSIFICATION OF INFORMATION

(A) A pointed example of the selective withholding of scientific information damaging to the position of the executive branch occurred during the SST debate. The Director of the Office of Science and Technology, then Dr. Lee DuBridge, convened a panel of experts headed by Dr. Richard Garwin to assess the supersonic transport. The panel concluded that there was a possibility of harm to the atmosphere from the high altitude transport, and was generally critical of the SST. When the Honorable Henry S. Reuss, Member of the U.S. House of Representatives tried to obtain the Garwin report from Dr. DuBridge, Dr. DuBridge refused to release it, under instruction of Mr. John Ehrlichman. The report was released only after a 2-year court battle.

As Judge Bazelon said in his opinion in *Soucie v. David* [448 F. 2d 1067 (D.C. Cir. Apr. 13, 1971)]:

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. It would defeat the purposes of the Office of Science and Technology, as well as the purposes of the Freedom of Information Act, to withhold from the public factual information on a federal scientific program whose future is at the center of public debate. \* \* \*

(B) Another well-known example of official hiding of unfavorable scientific information was exposed in *Committee for Nuclear Responsibility v. Seaborg* [463 F. 2d 783, 788]. In this case, a conservation group, seeking to halt underground tests of nuclear warheads on Amchitka Island, Alaska, claimed that the AEC, in its environmental impact statement, failed to mention responsible scientific opinion on the adverse environmental consequences of the tests, and omitted any reference whatsoever to reports from other Federal agencies in its possession, which indicated that the tests were potentially harmful to the environment.

(C) Abuse of security classification; differential, discriminatory prosecution.

When the record is classified the problem is compounded. Not only can security clearance be granted selectively to those favorable to official policy, but the threat of prosecution, or censure, or loss of security



clearance can be used effectively to chill discussion of official policy by those who have security clearance and are critical of that policy.

In *Mink v. Environmental Protection Agency* [464 F. 2d 742 and 92 SCT. 1196], the plaintiffs argued, ultimately unsuccessfully, that they were being denied access to documents simply because the documents were in a file with others that were classified as secret, but which otherwise themselves would not have been so classified.

(D) Again in his Pentagon Papers affidavit, Max Frankel cites examples of the ongoing daily process of selective leaks of classified information to friendly writers, by high Government officers.

Discussing the printing of the Pentagon Papers in the Times, A. M. Rosenthal, managing editor, New York Times was asked the question "Did it trouble you that technically this material was classified?" Rosenthal responded:

Obviously, you don't just blithely not consider a thing like that. However, most of us have been around a long time in the newspaper business and have covered this kind of thing. We are quite aware of classification. We have all been involved in many stories where we were given classified material if it was information that would help the Government. We all know that very often a government classifies and declassifies not for military security reasons but for whim or political purpose. We all know that people who leave the Government write books in which they use classified information. Sometimes they get somebody to declassify it, sometimes not.<sup>1</sup>

(E) The fear of prosecution has had a chilling effect on discussion of technological issues of great public moment, such as ABM, SST, bomb tests, the moratorium, disarmament, and environmental issues. The Government routinely classifies great masses of information and then declassifies those portions that it wants widely disseminated. It also leaks classified material to friendly spokesmen if it is favorable to the Government, while suppressing unfavorable materials. This system is designed to stifle those who seek materials for rebuttal and to intimidate those who dissent from the official Government line.

Before the Nuclear Bomb Test Ban Treaty, there was great agitation in scientific circles for the ban, while the AEC strongly urged continued testing of nuclear weapons. At that crucial time the Russians exploded a giant bomb, reported by Newsweek and Time to be a 60-megaton weapon. Newsweek also reported that the Russian bomb had a lead tamper (shell). It was a matter of common public knowledge at that time that bombs usually have a U<sup>238</sup> tamper, and that such a shell almost doubles the yield of the bomb.

A famous physicist and ardent public advocate of the test ban cited the Newsweek source, explained its significance and described the Russian bomb as effectively a 100-megaton bomb, through the simple device of replacement of the lead shell by the usual U<sup>238</sup> shell. He went on to urge cessation of tests by both sides.

The physicist was reprimanded by the AEC for release of classified information, and his security clearance was jeopardized. He was effectively muzzled.

How was the AEC able to muzzle him? To understand this, one must understand the problem of credibility. This scientist wanted to comment on national defense issues. To continue to be knowledgeable and credible, he had to have on-going access to classified data. And to have

<sup>1</sup> "Why We Published," Columbia Journalism Review, September/October 1971.

access he had to be cleared. In other words, the Government, by granting or denying security clearance, can designate which scientists are "responsible," and those persons who are critical of its policies are in danger of demotion out of the "responsible" category. The power to deny security clearance has a "chilling effect"—no, a "freezing effect"—on public discussion of technological issues of great moment.

### III. EFFECT OF SECRECY ON SCIENTIFIC PROJECTS

Secrecy is inimical to science. Science flourishes best in an atmosphere of free and open inquiry. Science advanced in democratic, ancient Greece, only to wither in autocratic Rome. It remained dormant in medieval tyranny, but with the rebirth of Western democracy, science again arose.

Today science and technology are crucial to our national well-being and safety. If we are to hold our own in the world, science must be healthy. One of the many steps the Government could take to stimulate scientific progress would be to reduce to an absolute minimum the amount of scientific and technological material that is classified "secret."

As an example, consider the energy problem. It is acknowledged by all experts that our Nation faces a serious energy shortage. One of the major prospects for energy production is thermonuclear power through conversion of deuterium in the sea into helium. Because the fusion reaction must be carried out in a plasma at enormously high temperatures—100 million degrees—the technological problems are enormous. Much of what we know of thermonuclear machines we have learned from the Russians who have been pace setters in the field. Yet much of the U.S. program, particularly that part involving laser-induced fusion, is classified, and progress is seriously crippled by the hidden nature of the undertaking.

Dr. Samuel Goudsmit, editor of *Physical Review Letters*, cites a recent manuscript, about which the referee wrote that he had a long and detailed criticism, but his criticism was classified. The original author responded that the referee's classified criticism was of that large part of his paper which was also classified and had not been submitted.

[Dr. Goudsmit's editorial follows:]

[From *Physical Review Letters*, Jan. 1, 1973]

#### SECRECY AGAIN

(Editorial by S. A. Goudsmit)

We thought that secrecy in physics had gone out of fashion some twenty years ago. That was the time when the politicians realized that any small country could learn how to make an atomic bomb if it could not borrow a couple from a friendly neighbor. It also became clear that atomic bombs are probably rather useless against guerilla fighters.

The new secret subject is fusion, more specifically laser-induced fusion. We don't know why it is secret. We have been told to mind our own business and not mingle in matters of government policy or politics. Our own business is publishing papers on advances in physics, and that is where we got into difficulties with secrecy.

All we know about fusion is what we read in the newspapers and journals. It is heralded as the energy source which will solve all the world's problems. It is inexhaustible and pollution free. The remotest corners of the world will



get enough energy so that everybody will be rich and can relax. Keeping work towards this goal secret sounds like hiding progress in cancer research. Perhaps it is done to prevent raising false hopes, or to prevent the premature sale of stock in oil companies. We don't know, and we don't understand.

Recently, we received a letter on the subject which was promptly sent to a referee. He prepared a long critical report, but could give us only two short paragraphs since the rest has to be declassified which will take a couple of months. We informed the author about the delay. He was not surprised and believes that the referee's critique most likely concerns items which the author had to omit from his letter because of secrecy. Can physics advance in this way? Isn't it silly!

Let us hope that the new year will bring some enlightenment. We wish our readers, our authors, and especially our referees good luck in 1973 with ample support and successful research.

Such restrictive conditions cripple progress. How can the community follow or participate in a play in which half the action, and the crucial half, is hidden behind the curtain? The community does not wish to. Many fine scientists, and most universities, simply refuse to work on problems about which they cannot publish.

Professor Edward Teller, who is in a position to know, says that we are keeping secrets only from ourselves. At a meeting of the American Physical Society, Washington, April 1973, he called for the creation of a panel to pass upon proposals for classification of secrets. In each instance, the Government would have to show why it is in the national interest to classify something. The burden would be on the classifier to prove that national security, or some other need, outweighed the advantages of free dissemination. Dr. Teller considers that no nation can have more than a year's scientific lead over a technologically developed rival, since whatever one person can figure out, another can also figure out within a year if he has a mind to. Professor Teller therefore proposes that all documents be declassified in 1 year, unless the Government presents to the classification board convincing arguments to continue classification for another year. Dr. Teller argues that such a policy would enhance national security since it is in the open that a democracy functions best.

In electronics computer technology, which has not been a classified field, we lead the world, because of the efficient competition of the open arena. Security hides inefficiency. Dr. Teller's statement, accompanying his call for a 1-year expiration on security classification, appears at the end of my testimony.

I have been a practicing physicist for 25 years. For 15 of those years I worked at the National Security Agency and the Naval Ordnance Laboratory, often on classified, and at times on highly sensitive matters. With that background, I comment on classification and security.

There are some things which must be kept secret.

But there are many secrets which have no reason to be. Security decisions are often so ridiculous as to be outrageously funny.

I have seen scientists, engineers, and mathematicians denied access to papers which they had themselves written. I have seen personnel denied jobs, precisely the same jobs at the same desks, as civilians, which they held for years, up to the moment of denial, as military, because of differences in civilian and military security clearance standards. I have seen a good scientist denied security clearance because he testified as a character witness in a security hearing for a person who was cleared as a result of that hearing. I have seen classified papers, carefully guarded, restricted in distribution, while the same paper

was freely circulated, widely known, and referenced in the open literature. I have seen much good research, but also much bad work, shielded from public scrutiny by the double fence.

From that experience, I conclude that a reform of the classification practices of the Government is long overdue, that declassification of much that is now classified is in the best national security, libertarian, and management interest of the Nation and that in each instance the burden should be on the classifier to show why something should be classified. I support wholeheartedly the efforts of Senator Muskie, Representative Moorhead, Senator Roth and others, to penetrate the barriers impeding the flow of official information to the public.

Thank you.

[Statement of Dr. Teller follows:]

#### THE FREEDOM OF SCIENTIFIC EXCHANGE

Contrary to general opinion, secrecy in science is an old established tradition. Freedom of the exchange of scientific ideas is a relatively new invention.

In fact during the millenium of alchemy, a great deal of good scientific work was performed. It bore little fruit, not because of poor quality of work, nor for the reason that the alchemists attempted what was impossible. The real reason was secrecy which prevented the type of collaboration which is essential to the growth of science.

Perhaps the most important change that occurred in the attitude of scientists dates back to the close of the 18th century when the traditional secrecy of alchemy was broken. Since that time, freedom of exchange was established and publication of scientific results became a duty.

A reactionary trend did set in after the end of the Second World War. The worldwide shock caused by the use of nuclear explosives reestablished a measure of secrecy within science which as yet we have not succeeded in overcoming. What is needed is not an action of individuals directed against secrecy, but rather an understanding of the problem which should result in the removal of secrecy from the field of science.

There are many who believe that secrecy is needed for reasons of national security. The fact is that secrecy did not prevent loss of leadership by the United States in the field of nuclear weapons. On the other hand, much more open policy permitted the rapid development of electronic computers, in which field the United States has a position of undisputed leadership.

Secrecy has erected barriers between our country and our allies. These barriers are harmful to science and are a source of weakness in the free world.

Individual Russian scientists do not love secrecy any more than scientists do in the free world. However, as long as secrecy prevails in the democracies, it is considered in Russia as a situation similar to a law of nature. In the field in which secrecy has been first established and then lifted: the search for a method of controlled fusion, collaboration between East and West has produced valuable results. In the Moscow agreements announced a little less than a year ago, collaboration in science has been called a building block of peace. Such building blocks will become more effective when secrecy in science is abandoned.

Toward the end of 1945, Niels Bohr stated, "One should expect that in the cold war each side will use the weapon which it can handle best. Secrecy is the appropriate weapon for a dictatorship, whereas openness is the weapon that democracies should use." By sticking to our principles of openness and free speech we may bring about in the course of time a change of heart in Russia. Among our Russian colleagues, we shall have many allies. While such a change will certainly not occur immediately, its long-term effects may well be more salutary than any formal agreement that one can imagine.

Senator MUSKIE. Thank you very much for your statement, Dr. Callen. I have two or three questions I would like to put to you.

You testified about the dangers of regressive classification of scientific material for which you claimed secrecy is very shortlived. Outside of the Atomic Energy Commission, in the agencies where you



worked in the past, was there any way to go through channels to get information and declassify it? Did anyone to your knowledge ever try to do such a thing?

Dr. CALLEN. I know of no instance where people approached either the National Security Agency or the Naval Ordnance Laboratory and asked that material be declassified. You see the problem one faces is the question of need to know. Since you don't know what is going on, you don't know what to ask to have declassified. So it is something like the question of the number of undiscovered islands. I mean until you know about it, you don't know whether you need to know about it. You would have to go there and ask them to declassify something of which you were not aware.

Senator MUSKIE. I suppose one possibility would be the actual classified papers which employees work with. Do you know of any instance in which employees working with classified papers would argue that these papers need not be classified?

Dr. CALLEN. People who are working with the papers?

Senator MUSKIE. Yes, sir.

Dr. CALLEN. I'm sure if you ask someone who is working with it, sometimes they will say, yes, it should and sometimes they would say, no, it shouldn't be classified. There is no particular reason why the person who is working with it would want it to be declassified except if he wrote it himself and wanted it to be published in the open literature. I mean he has access to it so he doesn't have the problem of not seeing it, so he has no particular motive to go out and press for declassification. It is the community that is denied access that has the problem. It is because of that that there has been no great pressure to declassify some 20 million documents which DOD holds as classified.

Senator MUSKIE. In other words, there are no built-in pressures?

Dr. CALLEN. There are no built-in pressures in the system, but of course the whole country suffers because of it. It is because the electronic computer field has been unclassified that we have done as well as we have. All of our activities, including the defense efforts, will be better off in the long run when these things are declassified.

Senator MUSKIE. What do you think might happen to a scientist in a Government research job if he undertook to push for declassification?

Dr. CALLEN. The scientist who works for the Government always has a fear of doing things that are going to jeopardize his security clearance because he doesn't want to lose that—because he doesn't want to lose his job. And so he is always demonstrating, by bending over backward, that he is a good risk. He plays it very straight. He has no reason to push for the other side and the safest way to show that he is the right kind of a person is by not pressuring for such things.

I wonder if I can relate a story about this whole problem of the intimidation of Government scientists and the Government worker in general and the pressure that is on him to show that he is the right kind of person, in the related problem of security clearance. It will only take a moment.

I was sent by the Navy for a year to Japan, and I was assigned to Osaka University. That was in 1965. At that time the war in Vietnam was extremely unpopular in Japan and especially so at the university and among the intellectuals, but generally throughout the whole nation. I was asked to speak to a peace group at Osaka Uni-

versity about what they described as "American aggression in Vietnam", a field that I was not knowledgeable about.

And so I went to the USIA. I went first to the State Department and then to the USIA which had a library there and said I would like to get an official spokesman to come to the university and defend American policy. I was advised by Mr. John Stegmeier, then Osaka-Kobe Consular General, and then by an official of the USIA that the Japanese did not want to hear from a U.S. Government official spokesman—it would have more credibility if I spoke at the university. They gave me much material and I went back and said yes, I would do this. Frankly, I wasn't that enthusiastic myself about the war in Vietnam, but I felt a certain burden to defend the American position. I was not a spokesman for the United States but I did my best to defend American policies.

So I read all of my material and set up a carefully structured meeting. I stipulated it could not be advertised broadly because I had visions of appearing as an expert on American affairs, which I was not. I said it couldn't be advertised outside the university, but that I would come and do my best. Well, I did that and I made my case. They already had written a rebuttal before I spoke. They read the rebuttal, and then a resolution in English condemning American aggression in Vietnam. They went through this charade, but I did my best.

When I came back to the United States, I was called down one day by Naval Intelligence and they said—well, they didn't say it was Naval Intelligence, I got a call to come down to Main Navy and I went down there and I walked in and they said, "Well, this is Naval Intelligence. We understand you have been dealing with a Communist group in Japan." I said, "What is that?" They said, "You were meeting with a Communist group and discussing American aggression in Vietnam." And I said, "Well, that is not the way I heard it, so let me tell you what happened."

I told this whole story, and they said, you know, they said, "we are taking this all down for the record now; you are being investigated." And that is the way I spoke to them. I didn't have the sense to insist upon a lawyer—I didn't think that I needed one—I should have done that. I didn't. I just told them the whole story as I told you now. And after I was done, I said, "You know, I want to see that file. I want to know what I did, and what you said I did." They said, "You can't see the file."

To this day, I am nervous about it. A security clearance is very important to me and as far as I know, I still have one. I went back to the Naval Ordnance Lab and I said I wanted to see what they had; what they said about me. They said that you can't see the file.

And it is very hard to explain to you. I felt very intimidated because I needed that job and I needed a security clearance to hold it. I kept saying, "You know, let me write another statement out and this is what happened." They said, "Well, we will enter any statement you make in the file." But I have never seen the file to this day.

I think that is a terrible problem. A person should be able to see his security file so he knows what it says. I mean, there may be a case against me in there but I don't know. It is a serious thing.

I can tell you that after that I was more cautious. After that, I wouldn't have gone back before that peace group if I had been invited



a second time, even though I thought I had been acting in my country's interest. So I very much felt frightened and intimidated by that experience. Generally speaking, the Government employee who has a security clearance feels that way. He doesn't get to know what is in his file. If something is in there, he'll never know. It may stay there the rest of his life. It may keep him from getting other jobs, maybe he is considered of questionable loyalty, and he will lose the job that he has. So he acts more cautiously than the law ever specified that he has to, because he is frightened by this vague process which he has no way to respond to or even to be fully aware of. He is not able to rebut whatever is in his file because he doesn't know what it says about him.

It is a very intimidating situation, really, I think the whole question of the security files has to be opened up somehow. We must have a right to see what the Government is saying about our loyalty. And acting on. Because you see, you can be denied a higher level of security clearance, without a formal investigation, or without even learning you were being considered for it, because of stuff in your file.

I am sorry to have spoken so long.

Senator MUSKIE. I understand.

Let me ask you this. Dr. Teller proposes a 1-year limit on scientific secrets and perhaps a panel of scientists to oversee secrecy practices in the government.

Would working scientists realistically give up their research activities for such an administrative chore?

Dr. CALLEN. Yes, it happens I was chairman last year of a division of the American Physical Society, called the Forum for Physics and Society, and I am on the executive board of that division now. I mention this because the existence of the forum is evidence of a change in the ethos of science within the last few years.

There was a traditional view which pervaded the whole post war period that a scientist should stick to his last—that the thing to do was to be a technical expert. You turn off your moral judgment and you perform as a scientific tool. In other words, you have expertise but you make no value judgments; you are simply available as a technical resource. That was the classical view.

With that view it was very hard to get scientists to play the role that they should play as responsible public citizens. I must say I think scientists have been sadly deficient in serving the public interest.

That has changed in the last few years. There has been a great rethinking of the social responsibility of scientists. The Forum on Physics and Society is evidence of that. The American Physical Society now recognizes a social responsibility well beyond that of writing papers for the Physical Review. Today there are scientists who want to serve and recognize their responsibility and are eager to do so.

I have no doubt that good scientists would make themselves available. I am sure the Forum and the American Physical Society would be happy to help. That role could be filled today whereas it would have been difficult to do so 10 years ago. I am sorry to say.

Senator MUSKIE. Well thank you very much, Doctor, for your statement and for your suggestions. We appreciate them very much.

Dr. CALLEN. Thank you very much for allowing me to come here, Senator.

Senator MUSKIE. Thank you.

Our last witness of the day is Prof. Thomas M. Franck, director of the Center for International Studies, New York University.

Dr. Franck, it is a pleasure to welcome you here this afternoon.

# STATEMENT OF PROF. THOMAS M. FRANCK, DIRECTOR, CENTER FOR INTERNATIONAL STUDIES, NEW YORK UNIVERSITY

Dr. FRANCK. Thank you very much. May I have your consent to just summarize briefly and just place this in the record?

Senator MUSKIE. Yes, you may place your entire statement in the record.

[The prepared statement of Thomas M. Franck follows:]

## PREPARED STATEMENT OF THOMAS M. FRANCK

I am grateful for the invitation to come before you to discuss the question of executive privilege and secrecy as these pertain to foreign relations.

This problem has been with the United States almost from its inception and is, to some extent, inherent in the Constitution. What appears to emerge from the record, stretching from the Continental Congress to the present, is (1) constitutional ambiguity, (2) practical accommodation and (3) a power equilibrium between the executive and legislative branches in the field of foreign relations. Did President Washington provide the documentation in connection with the St. Clair expedition because it was his constitutional responsibility to do so, or, because, although he had a constitutional discretion to withhold the information, he voluntarily chose to comply with the request of Congress? Is it courtesy and responsibility, or is it their reading of constitutional imperatives, which causes Congress to request information from the Department of State only "if not incompatible with the public interest"?

If the meaning of the historical precedents, and the self-serving statements which accompany them is ambiguous, that ambiguity has also accommodated much pragmatic adjustment of differences. In 1796, for example, the House of Representatives did not go to the brink in its efforts to get the instructions and other documents used in negotiating the Jay Treaty with Great Britain. [3 Annals of Congress 535. See also: Jefferson, *Writings*, Vol. 1 (Ford ed. 1892), p. 189; Berger, "Executive Privilege v. Congressional Inquiry" (1965), 12 U.C.L.A. Law Rev. 1044 at 1079.] Many in Congress also agree with President Eisenhower's belief that it is "essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid" and understood his insistence that they were "not to testify to any such conversations or communications or to produce any such document or reproductions" before the McCarthy subcommittee. [94 Congressional Record 6621.]

Again, in the spirit of pragmatism, it is generally recognized that Congress should not compel the executive, as a matter of mutual accommodation, to reveal information which would destroy the "cover" of a secret agent, violate the confidence of—or embarrass U.S. relations with—a foreign government. In 1930, as part of its advise and consent function, the Senate called on the Executive to produce all papers relating to the negotiations of the London Treaty for the Limitation and Reduction of Naval Armament. The President, pointing out that some of the documents were notes made by U.S. delegates who were very critical of foreign officials, agreed to produce most, but not all documents, and this provided a satisfactory compromise in the specific instance. [73 Congressional Record 86 (1930); Mary Louise Ramsey, Library of Congress, Congressional Research Service, American Law Division "Executive Privilege," Memorandum of June 7, 1971, 43 at 43-45.] Again, more recently, several Senators with the most passionate commitments against the Vietnam war refused to help make the Pentagon Papers public.

However, Congress has never accepted that it could not be trusted with secrets, or that it could be denied essential information for security reasons. As early as 1843, the House of Representatives declared that its members are "as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have." [3 Hind's Precedents of the House of Representatives,



p. 185.] Congress, nevertheless, has voluntarily abstained from requesting the disclosure of most hard-core security information, but it has done so not as a matter of constitutional obligation but of functional cooperation.

This functional cooperation rests squarely on a recognition by both executive and legislative branches of government that their powers, in the foreign relations field, are separate, equal, but profoundly interrelated. Congress has said, in effect, that it would permit the Executive to make the initial determination of what information cannot be disclosed in the national interest: but only for so long as Congress is convinced that this executive discretion is exercised solely in the best interests of the nation and not merely in the best political interests of the Executive.

Unfortunately, executive-legislative relations in the United States have now entered a period when this mutual confidence, the *sine qua non* of voluntary Congressional reticence, has been eroded. Disclosures in the Pentagon Papers concerning the second Gulf of Tonkin incident, among others, have revealed executive dissemblance. The Pentagon Papers also indicate that much of the information kept secret by the executive branch in the form of highly classified National Intelligence Estimates and Special National Intelligence Estimates, does not bear out the political and tactical conclusions the Executive drew from them. Thus secrecy, during the Vietnam war, was subject to two serious abuses. First, it was used to mislead the public. Second, it was a shield against criticism from Congress and from the public. Criticism could more readily be dismissed as uninformed if it came from persons not privy to the most sensitive and important information—which meant everyone outside the inner circle of the President. Yet this information, in the opinion of Thomas Hughes, Mr. Johnson's Director of Intelligence and Research in the Department of State, actually argued as much against, as for, the very policies the Executive was following.

If the withholding of information by the executive from the legislative branch has not been the sole cause of the growing dis-equilibrium between them in the management of foreign relations, it is at least striking evidence of it. The responses recently elicited by Senator Ervin's questioning of the Department of Defense concerning Army surveillance of U.S. civilians and data bank programs, the refusal of information to the General Accounting Office of Congress by the Departments of Defense and State, and the refusal to supply Congresswoman Mink with environmental information relevant to the *Cannikin* tests, taken together with Congressional reaction to these refusals, suggest that the erosion has gone rather far. [United States, Senate Subcommittee on Separation of Powers of the Committee on the Judiciary, *Hearings*, "Executive Privilege: The Withholding of Information by the Executive," 92nd Congress, First Session, 1971, pp. 5-6; see also, "Summary Listing of Significant Access to Records Problems in Recent Years," pp. 310-314.] Congress and the public no longer believe that it is primarily hard-core security which is being protected by the withholding of information.

The only way confidence can now be restored in the field of foreign relations information flow is for the determination of what is to be withheld from Congress to be made either by the Executive and Congress in a joint administrative process or by an impartial third party such as the courts, or both. One such effort at restoring confidence was that of Senator Muskie in December, 1971, with bill S. 2965, the "Truth in Government Act of 1971." There is still much in this legislation which could usefully be enacted. Some of its provisions are now to be found in the current House bills of Congressmen Horton and Moorhead, H.R. 4960 and H.R. 5425. But while these bills attempt to put the Courts into the umpiring role, they do not set out a sufficiently narrow and specific standard by which the Courts may determine which disclosures are required and which are not. The Freedom of Information Act's standard exempts from disclosure information on "national defense or foreign policy" is classified by executive order. This standard, even if applied by courts, covers far more than is necessary. The Muskie bill, on the other hand, exempted from disclosure only "information the declassification of which would clearly and directly threaten the national defense of the United States." This is a more *de minimis* standard, and a much better description of the irredneible requirement for secrecy. The Muskie bill had another useful innovation. In making a determination as to whether information kept secret by the Executive should be transmitted to Congress, the Muskie bill provides that the Board established for that purpose, "shall weigh the respective constitutional authorities and duties of the parties, including (1) the extent to which disclosure would impede the orderly administration of the executive branch; and (2) the extent to which the information contained in such documents is necessary for the

performance of legislative functions." Whether the umpiring is done by a Legislative-Executive joint commission, or by the courts, or both, it is important that the umpire be provided with rules that do not tilt towards one of the parties. The present rule in FOIA exempting "national defense and foreign policy" unfortunately is so tilted.

Another set of reforms is aimed at the separation of powers or "executive privilege" problem, particularly refusals to testify. Senator Ervin in his joint resolution S.J. Res. 72 and Senator Fulbright in his bill S. 858 of February 15, 1973, both deal with the question of executive privilege in a way which seeks to preclude its facile use, *inter alia* by requiring the President to invoke it in writing. Neither proposal, however, makes clear what processes might follow if the President were to invoke privilege in instances and for reasons deemed unacceptable by Congress. Although Professor Raoul Berger has pointed out in his testimony to you on April 12, 1973 that the issue could then be litigated, this approach is not without its problems. In the first place, the measures, at least indirectly, appear to give Congressional recognition to the existence of some "executive privilege." Second, a litigation arising out of a failure of the Executive to comply with the procedures set out in these measures would pose the broadest constitutional issues. I am not confident, viewing the legal history, the equities and the Court itself, that Congress would win such a suit.

If there is to be a judicial confrontation, Congress might be in a stronger position if the issue were posed more narrowly to the court in the form of an order to apply and enforce a legislated standard for the production by executive officials, of information, both written and oral. This could conceivably be achieved by further amendment of the Freedom of Information provision of the Administrative Procedure Act. Such amendment might, specifically, require appearances in all instances, while defining narrow exceptions to a general requirement of disclosure. In the field of foreign relations these exceptions might be based on the Muskie definitions quoted above, together with specific exemptions permitting non-disclosure of negotiating positions, diplomatic instructions, names of informers and informants and information tending to disclose their identity, and very little else.

Whatever the Congress decides to do about compelling disclosure by officials, much of the most relevant information will continue to reach Congress and the public through one or another form of self-help. It seems to me a matter of great urgency that Congress not strike a bargain which would improve one route of access to official information while another older, well-traveled route is blocked off. That, clearly, would be the effect of Bill S. 1400.

The tradition of information leakage is an important one in all democracies. Congress has repeatedly refused, even in wartime, to enact legislation making all leakage of information criminal. In Britain, where the Official Secrets Act, Official Secrets Act 1911, 1 & 2 Geo. 5, c.28, makes all unauthorized disclosures criminal, the law is very rarely enforced and is now under critical review. Rt. Hon. Patrick Gordon Walker, himself a former Foreign Minister, believes that a certain amount of leakage from the cabinet is essential to healthy democracy. [Patrick Gordon Walker, *The Cabinet* (London: Fontana/Collins, 1972), p. 27.]

As the Official Secrets Act of Britain now stands, its reach is broader than anything in the United States: indeed, than anything that would be permissible under the U.S. Constitution. [Official Secrets Act 1911, 1 & 2 Geo. 5, c.28.]

Section 2 of the Act makes it an offense for any government official, to disclose any official information (i.e. obtained in the course of his employment), whether secret or not, except to authorized persons. It is also an offense for anyone unlawfully given such information, even a journalist, to publish it or communicate it to anyone else. It is, further, an offense for any person having been entrusted with information in confidence, or as a government contractor, or employee of such, to disclose it under any but authorized circumstances. The possibilities for prosecution under this provision are virtually unlimited. The fact that the provision has been used sparingly in Britain, and a similar section even more rarely in Canada, does not preclude speculation about its "chilling" effect. This "chilling effect" in Britain is compounded by the "voluntary" D-Notice system which is not subject to criminal penalties for violation but nevertheless carries the implication that violators face charges under the Official Secrets Act. Still, there have been very few prosecutions of newspapers or journalists in Britain, one exception being a military newspaper in World War I and the second a recent prosecution arising out of the Nigerian civil war. The latter was not only lost by the government but led the judge to ask whether "this Act has



reached retirement age and should be pensioned off. . . ." [Harry Street, "Secrecy and the Citizen's Right to Know: A British Civil Libertarian Perspective," (New York University, Center for International Studies, 1972), mimeo., p. 11.] This, in turn, produced the Franks Commission and its report, with its recommendations for narrowing the law.

Also, there have been no prosecutions at all, in Britain, of the large number of Prime Ministers, Ministers and Members of Parliament who have taken to publishing "instant" memoirs. These appear to be considerably more indiscrete than those of their American or Canadian counterparts and help to undermine the protective custody in which OSA places official information.

Disclosures by British and Canadian Ministers and ex-Ministers and their most senior government advisers, it is generally accepted, are "self-authorized," [Franks Report, *ibid.*, p. 14] and thus, invariably, escape the prohibition. In the twenty-nine British prosecutions under section 2 turned up by the Franks Commission, fully twenty-five of the defendants were present or former lower echelon civil servants, contractors or military personnel. Of those prosecuted, incidentally, nineteen were only fined, received suspended sentences, or had their charges dropped. [*Ibid.*, pp. 116-118.] Typical of the rare instances of more severe penalties are cases of policemen giving information to criminals.

It could therefore be argued that the British Act, in practice, is not as bad as it looks. Indeed, the fact that the Act looks so bad may have had a reverse "chilling effect"—on prosecution. But the Franks Commission has recommended fairly extensive surgery, proposing the repeal of section 2 and its replacement with an Official Information Act which would apply only to certain specified information. Among these, is "classified information relating to defence or internal security, or to foreign relations" but *only* where "the unauthorized disclosure . . . would cause serious injury to the interests of the nation." [*Ibid.*, p. 101.] This new standard is undoubtedly libertarian advance.

But Britain can never be a model for the United States in respect of information flow between Parliament and Government or Government and people. In America, vast, almost total power over foreign relations has come to be centralized in one man: the President. To be sure, he has his advisers and assistants on the White House staff and in the Cabinet. But these exercise no political clout of their own and they are not representatives of anyone. The political power of decision-making in the executive branch is a one-man process. This is not so in Britain, where the cabinet members have independent bases of power and can and do block Prime Ministerial decisions, even in the field of foreign affairs. Under the British system, foreign policy cannot be made by one man; it must be sold to the cabinet, a group of near-equals. In America, foreign policy can be made by one man. Therefore the role of the Congress and of the press as critic becomes much more important. Vigorous criticism by those outside the executive depends, to an extent, on their access to key information.

In the United States, meanwhile, there is both dispute about the extent to which communication and publication can give rise to criminal penalties and a series of proposals before Congress to ensure such penalties in cases short of espionage.

The principal thrust of the Espionage Laws in the United States, as in s. 1 of the OSA, is to prevent the deliberate transmission of valuable information to an enemy. The basic ingredients of the offense are, thus, *culpable intent* and *harmful effect*. These ingredients are set out in most, but not all the offenses. [Title 18, ss. 794(a) and (b).] Those in which it is not, are the result of legislative accident which would either be repaired by judicial construction or be unconstitutional. [Title 18, ss. 793(d) and (e). Benno C. Schmidt, Jr., "The American Espionage Statutes and Publication of Defense Information," (New York University Center for International Studies, 1973), mimeo., pp. 14-15.]

In addition to the Espionage Act, the United States also has in its armory Title 50 of the Code, section 783 of which, applying only to government employees, makes it an offense to communicate any classified information to an agent or representative of a foreign government or an officer or member of any communist organization. The giver of the information must know that it is classified and that he is giving it to someone within the prohibited categories, but that is all the motive that need be proven. *Mala fides* need not be shown and the classification is not reviewable by the court.

In the newly-proposed Criminal Code there are more extensive prohibitions enforced by criminal sanction. [S. 1400, 93d Congress, 1st Session, 1973, ss. 1122-1126.] The further linking of classification with criminal sanctions against leaking by bureaucrats or other "authorized" persons is quite clearly a step towards

greater suppression of all classified information. [S. 1400, *ibid.*, s. 1124.] The "authorized person" could then be punished for communicating to any "unauthorized person"—not just to a foreign government. This is obviously intended to catch much leakage that is in no way tainted with spying or harm to the nation, or help to an enemy. The new U.S. proposals are also particularly restrictive in another sense. They seek to stem the flow of unauthorized information by eliminating the need for the prosecution to show that a disclosure caused or could cause injury to the United States or benefit to an enemy. All "national defense" information becomes a ward of the criminal law, whether classified high, low, not at all, or incorrectly. Under the new proposals, a "person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it." [*Ibid.*, s. 1122.] The definition of "information relating to the national defense," could include any information, classified or not, "relating to . . . the conduct of foreign relations affecting the national defense" whether the information were harmful to the U.S. or only embarrassing to the credibility of some of its political leaders.

Whatever Congress does about reforming the uses of Executive Privilege and the Freedom of Information Act, unauthorized information will still remain democracy's principal antidote to unfettered government discretion, particularly in foreign affairs. If the proposals in S. 1400 are passed, and the *Franks* proposals are adopted in Britain, the American restrictions on unauthorized disclosure will have the dubious distinction of having become more severe than England's Official Secrets Act. Out of step with other democracies, the United States will have taken a long step backwards in the evolutionary march of freedom and public participation.

The Executive is entitled, of course, to a *quid pro quo* if there is to be new legislation making executive secrecy subject to reasonable standards implemented by third-party process. But that *quid pro quo* can be expected to come in the form of better Congressional and public understanding for foreign policy and defense initiatives which have been arrived at through open consultation and informed democratic choice.

MR. FRANCK. I am very grateful for the opportunity to testify to this committee at this juncture in the history of the efforts to devise a rational solution to the flow of information between those branches of Government which share joint jurisdiction over the field of foreign affairs and foreign policy.

The scholarly community no longer believes that it is primarily hard core security data which is being protected when information is withheld under the label of foreign policy and national defense. This catch-all category has become the Fifth Amendment of executive offices.

Disclosures in the Pentagon Papers trial concerning the second Gulf of Tonkin incident among others have revealed a measure of executive dissemblment. The Pentagon Papers also indicate that much of the information kept secret by the executive branch in the form of highly classified national intelligence estimates and special national intelligence estimates does not bear out the political and tactical conclusions which the executive purports to have drawn from them.

So, secrecy during the Vietnam war was subject to two serious abuses.

First it was used to mislead the public at the time by withholding information and releasing information that didn't stand close scrutiny, but secondly and perhaps more importantly, the existence of secrecy was used as a shield against criticism from the Congress and from the public. The criticism could more readily be dismissed as uninformed if it came from persons not privy to the most sensitive and important information, which means everyone outside the inner circle of the President. Yet, this information, in the opinion of Thomas Hughes, Mr. Johnson's Director of Intelligence and Research in the



Department of State, actually argued as much against as for, the very policies which the executive was pursuing. It is an argument now advanced at least in private by a number of key members of the intelligence establishment that their opportunity to do their work would be substantially enhanced if their role were seen more as that of an independent agency responsible not only to the executive, but also to the legislative branch.

They conclude quite rightly that if they were responsible to more than one branch, the executive would be more likely to have to listen to the information that was being given to them by the intelligence community.

If the withholding of information by the executive from the legislative branch has not been the sole cause of the growing disequilibrium between them in the management of foreign relations, it is at least striking evidence of it. The responses recently elicited by Senator Ervin's questioning of the Department of Defense concerning Army surveillance of U.S. civilians and data bank programs, the refusal of information to the General Accounting Office of Congress by the Departments of Defense and State, and the refusal to supply Congresswoman Mink with environmental information relevant to the *Cannikin* tests, taken together with congressional reaction to these refusals, suggest that the erosion has gone rather far.

The only way confidence in the information flow can now be restored in the field of foreign relations is for the determination of what is to be withheld from Congress to be made either by the executive and Congress in a joint administrative process or by an impartial third party such as the courts, or both. One such effort at restoring confidence was that of Senator Muskie in December 1971, bill S. 2965, the Truth in Government Act of 1971. There is still much in this legislation which could usefully be enacted. Some of its provisions are now to be found in the current House bills of Congressmen Horton and Moorhead, H.R. 4960 and H.R. 5425. But while these bills attempt to put the courts into the umpiring role, they do not set out a sufficiently narrow and specific standard by which the courts may determine which disclosures are required and which are not.

The Freedom of Information Act's standard exempts from disclosure information on "national defense or foreign policy" if classified by Executive order. This standard, even if applied by the courts, covers far more than is necessary. The Muskie bill, on the other hand, exempted from disclosure only "information the declassification of which would clearly and directly threaten the national defense of the United States."

There are, I think, good reasons why a new congressional enactment ought to steer clear of the classification process as the basis for achieving reform in information flow. But aside from the reference to declassification, I think the definition of what might reasonably continue to be embargoed information contained in the Muskie bill is about right. This is a more *de minimus* standard, and a much better description of the irreducible requirement for secrecy. The Muskie bill had another useful innovation. In making a determination as to whether information kept secret by the executive should be transmitted to Congress, the Muskie bill provides that the board established for that purpose:

Shall weigh the respective authorities and duties of the parties, including (1) the extent to which disclosure would impede the orderly administration of the executive branch, and (2) the extent to which the information contained in such documents is necessary for the performance of legislative functions.

The first one is something that is always foremost in the mind of the executive branch.

Whether the umpiring is done by the legislative, executive joint commission, or by the courts, or both, it is important that the umpire be provided with rules that do not tilt toward one of the parties. The present rule in FOIA exempting both "national defense and foreign policy" unfortunately is so titled.

Another set of reforms is aimed at the separation of powers or "executive privilege" problem, particular refusals to testify. Senator Ervin, in his joint resolution Senate Joint Resolution 72 and Senator Fulbright in his bill S. 858 of February 15, 1973, both deal with the question of executive privilege in a way which seeks to preclude its facile use *inter alia* by requiring the President to invoke it specifically in each instance and in writing.

Neither proposal makes clear what processes might follow if the President were to invoke the privilege in instances and for reasons deemed unacceptable by Congress. Although Prof. Raoul Berger has pointed out in his testimony to you on April 12, 1973, that the issue could then be litigated, this approach is not without its problems. In the first place, the measures at least indirectly, appear to give congressional recognition of some "executive privilege." Second, a litigation arising out of a failure of the executive to comply with the procedures set out in these measures poses the broadest constitutional issues. I am not confident, viewing the legal history, the equities and the court itself that Congress would win such a suit based on the broad question of executive privilege.

If there is to be a judicial confrontation Congress might be in a stronger position if the issue were posed more narrowly to the court in the form of an order to apply and enforce a legislated standard for the production by executive officials of information, both written and oral and to do so within the guidelines set out in the legislation covering the information flow between the branches. This could conceivably be achieved by further amendment of the freedom of information provision of the Administrative Procedure Act. Such amendment might, specifically, require appearances in all instances, while defining narrow exceptions to a general requirement of disclosure, public disclosure.

In the field of foreign relations, these exceptions might be based on the Muskie definitions which I just quoted, together with specific exemptions, permitting nondisclosure of negotiating positions, diplomatic instructions, names of informers and informants and information tending to disclose their identity, and very little else.

As for disclosure to Congress in confidence, I believe that the law should deal functionally with the question of privilege requiring the disclosure to Congress of all requested data and information other than the advice given the President by a Cabinet officer or a member of the White House staff. Congress should make itself responsible under its own rules of procedure for the security of delicate information obtained in this fashion.

Whatever the Congress decides to do about compelling disclosure by officials, much of the relevant information will continue to reach



Congress and the public through one or another form of self-help. It seems to me a matter of great urgency that Congress not strike a bargain which would improve one route of access to official information while another older, well-traveled route is blocked off. That clearly would be the effect of S. 1400 and to a large extent with S. 1.

The tradition of information leakage is an important one in all democracies. Congress has repeatedly refused, even in wartime, to enact legislation making all leakage of information criminal. In Britain where the Official Secrets Act makes all unauthorized disclosures criminal, the law is very rarely enforced and it is now under critical review. The Right Hon. Patrick Gordon Walker, himself a former Foreign Minister, believes that a certain amount of leakage from the cabinet is essential to a healthy democracy.

In the newly proposed Criminal Code there are more extensive prohibitions enforced by criminal sanction against leakage. The further linking of classification with criminal sanctions against leaking by bureaucrats or other "authorized" persons is quite clearly a step toward greater suppression of all classified information. The "authorized person" could then be punished for communicating to any "unauthorized person" and not just to a foreign government. This is obviously intended to catch much leakage that is in no way tainted with spying or harm to the Nation or help to the enemy.

The new U.S. proposals are also particularly restrictive in another sense, that is the S. 1400 proposal. They seek to stem the flow of unauthorized information by eliminating the need for the prosecution to show that a disclosure caused or could cause injury to the United States or benefit to an enemy. All "national defense information" becomes a ward of the criminal law whether classified high, low, not at all or incorrectly.

Under the new proposals, a "person is guilty of an offense if he knowingly communicates information relating to the national defense to a person not authorized to receive it." The definition of "information relating to the national defense" could include any information, classified or not, "relating to the conduct of foreign relations affecting the national defense" whether the information were harmful to the United States or only embarrassing to the credibility of some of its political leaders.

Those of us who work primarily in foreign relations know that there is very little in the field of foreign relations that does not also intimately touch on domestic problems, and vice versa. We know that foreign relations is not a discrete field, it is not a meaningful category. Watergate has affected the administration, not only in its domestic affairs but also considerably in its ability to take initiatives in the foreign relations field. The wheat transaction with the Soviet Union is in one sense a transaction in international trade, but it has an important effect on the cost of living in the United States. Textile quotas similarly may in one sense be foreign but in their impact may be largely domestic, and one could go on indefinitely.

Whatever Congress does about reforming the uses of executive privilege and the Freedom of Information Act, unauthorized information will still remain in democracies as a principal antidote to unfettered Government discretion, particularly in foreign affairs.

If the proposals in S. 1400 and S. 1 are passed and conversely the proposals of the Franck's Commission in England are adopted in

Britain, the American restrictions on unauthorized disclosure will have the dubious distinction of having become more severe than England's Official Secrets Act.

Out of step with other democracies, the United States would have taken the long step backward in the evolutionary march of freedom and public participation. The executive is entitled of course to a quid pro quo if there is to be new legislation making executive secrecy subject to reasonable standards implemented by third-party process. But that quid pro quo can be expected to come in the form of better congressional and public understanding for foreign policy and defense initiatives, which have been arrived at through open consultation and informed democratic choice.

May I just add in conclusion that there are in the affairs of nations certain tides that run in favor and others that run against certain kinds of initiatives. It seems to me that the tide for reform in the flow of information between Government and Congress and between Government and the public or executive and Congress and executive and public is particularly high at the present time and perhaps the Congress ought not to allow these next weeks to pass without riding that tide to bring about reforms which certainly ought to be considered.

But perhaps now is the best opportunity the Congress is ever likely to have of catching the strained and limited attention span of those who are charged with governing this country.

Senator ROTH. Professor Franck, first I would like to say that Senator Muskie regrets he had to leave in order to attend another hearing. I believe it was a conference committee meeting on the highway bill and for that reason he couldn't continue to be here. That is one of the great problems of serving in Congress and certainly I know it is frustrating to those of you who are good enough to appear before us.

As you may or may not know, I have introduced legislation that would establish a national commission something like the Franck's Commission in England to which you made reference to look into the whole gamut of these issues. I wonder if you would support this idea or if you feel that Congress should go ahead and legislate directly at the present time? Do you have any thoughts on these approaches?

MR. FRANCK. You have posed, Senator, a choice between two goods. I think it is fortunate a person is able to choose between two such options.

I would have thought that either way would be satisfactory. I think that you will be a better judge and this committee will be a better judge of whether it requires more information and more study. If I were a Senator, I would probably feel a certain impatience and readiness to seize the moment and to legislate, perhaps establishing a commission to oversee the operation of the legislation or to make recommendations to the committee on the operation of the legislation during its first year or two.

Senator ROTH. Well, one of my concerns is that we don't just react to the immediate situation. What we are trying to do here is to maintain a proper balance of differing needs. At the last series of hearings on this subject, I brought up that when you go back to the 1950's during the days of Senator McCarthy, it was the Congress that appeared to be stalemating or frustrating the decisionmaking processes of the executive branch. People laugh and say that can't happen again, but



I am not persuaded that we can't see the same kind of circumstances arise again.

For that reason, just commenting on your observation, one of the things that would concern me is that if we legislate now, we might be reacting to one set of circumstances today that 6 months or 2 years or 5 years from now we may regret.

Let me ask about a related question. Some of our witnesses have made a distinction between the congressional right to know and the public right to know. I wonder if you could elaborate further as to what kind of information you think can properly be withheld from the Congress?

Mr. FRANCK. I agree with the distinction between the public right to know and the congressional right to know and I think that ought to be subject to somewhat different procedures, although an individual Member of Congress ought to be able to proceed as a member of the public if he wants to proceed on his own. The standard that seems to me to be balanced—and like you I feel that it is necessary not to overreact and to try to strike a balance—the balance as between public and government I think ought to be situated somewhere around one rather general category—that being the military and defense category, which can be in Senator Muskie's terms or you can just say dealing with logistics strategy of military defense, that rather broad category.

Then there are a number of limited functional things such as negotiating instructions or information that would be likely to expose or embarrass informants, including foreign governments and informers and possibly a few other things that one could mention based on case experience in the history of the country.

If one examines that history, one finds in fact Congress has pretty scrupulously avoided asking for that kind of information in the past. There may be a few things that ought not to be asked for either by Congress or by the public. However, while I think that Congress probably would tend to avoid asking for this kind of information, I would rather see these limitations set not by the executive but by internal rules of the Senate and of the House. The executive treats information through a classification system which governs who may see what. That classification system is perfectly within the executive prerogative as long as it operates only within the executive branch. The Senate and the House might very well develop something analogous to a classification system of their own that would determine who was entitled to receive what kind of information. That would be an internal regulation of the two Houses of Congress.

Underlying that kind of a legal concept is a political judgment—given the fact that Congress and the executive share the foreign relations power of the United States by virtue of the Constitution—that the most sensible approach to providing sufficient information to make both these parts of the Government operate is to use one information and intelligence establishment, but make it responsible to both branches and then make both branches responsible for the caring and feeding of the information once it is received by that branch.

In the case of the executive there is the classification system. In the case of Congress, I suppose Congress could develop a system by which certain chairmen of the committees would be entitled to information of one level of importance, and all Members of Congress

would be entitled to information of another level of importance, and who got what information would to some extent depend upon who was most intimately involved in the planning and processing of the subject matter.

Senator ROTH. Would it make sense to have, whether it be an internal rule or otherwise some kind of requirement—and I am speaking now of the congressional right to know—that in demanding information there has to be a clear legislative purpose, perhaps established by a committee?

Mr. FRANCK. Yes; legislative or oversight purpose I suppose would be the best; that is, that it pertained to a legitimate activity of Congress. I think that would be acceptable. I was thinking of the kinds of rules courts imposed on committees that went on fishing expeditions during the McCarthy period; the rules that restricted them to questions appropriate to their field of inquiry.

Senator ROTH. One of the concerns in the 1950's was that Congress shouldn't try to demand every word, every statement, every paper in the executive branch because, if you do, you will destroy the decisionmaking process. I think there is some merit in that concern.

I was just thinking that this may be a partial answer—that while having a right to know, the committee still would have to have some relevant legislative purpose in seeking the information.

Mr. FRANCK. A distinction can also be made between policy advice which was the principal target of the McCarthy subcommittee and intelligence estimates. I suppose, theoretically, the Congress could establish an intelligence network and a huge research establishment of its own, but it does seem to me to be terribly wasteful of public resources. It also seems to me not to be the best way to utilize the data to make it available only to one employer. Congress and the executive would serve as a check on each other in their respective interpretation of intelligence estimates, in the conclusions they drew from such data.

But I could see legislation making a distinction between the advisory function of the President's household and the data-gathering process of the bureaucracy. I think the data-gathering process ought to be made available to Congress in the same way it is made available to the executive subject to internal housekeeping rules by each branch to maintain necessary security standards.

Senator ROTH. Would you think it would be possible to establish arbitrary time limits as to secrecy after which the burden would be on the executive branch to show a special need for continuing the classification?

Mr. FRANCK. As a scholar I think that is terribly useful but I have refrained from talking about it because I think it is a much less important issue; I don't think you get much information that is useful to the central process of a democracy through a 1-1 rule or a 2-2 rule or a 20-20-20 rule. In other words, whatever the rule, any rule that is conceivable and acceptable to the executive is going to be relatively useless from the point of view of the legislative function of Congress, but certainly from the point of view of a scholar it would be helpful if one didn't have to wait quite as long.

It seems to me to be a different problem. The one stone doesn't kill both birds.

Senator ROTH. Going back to the idea of creating an independent commission of some sort to review such matters and to declassify, not



the study commission now, but an actual commission responsible for declassifying, would it be helpful if we had some members of the commission appointed by the executive branch with others appointed by the Congress?

Mr. FRANCK. I think it would work if you used the commission approach that would be something along the lines of the composition suggested in the Horton bill which makes some concessions to the executive sensibility as compared to the earlier Moorhead draft of 1972. Now that probably would be as good an approach as any. That is a 3-4 kind of division. That is two from each house and three from the executive I think. The earlier proposal was more heavily weighted toward Congress.

Senator ROTII. One of the problems is, if information is hidden effectively, it would be increasingly difficult for Congress to do anything but trust the executive's discretion. And if we need, as some believe, a mechanism of some sort that must judge that discretion, we have it now informally in the special interest of officials who blow the whistle on actions they disapprove of, and in the press which acts as a megaphone for the whistle blowers. Is it possible we are better off as we are with these traditions operating even improperly at times, than trying to define perfect standards in an area like this?

Mr. FRANCK. If I understand you correctly, Senator, your question suggests the fallacy of a linkage between laws that create a more systematic flow of information on a rational basis for a more rational sharing of information on the one hand and criminal sanctions which prohibit the flow of information through any but these approved channels.

If I understood the question correctly, I would certainly agree that the one has very little to do with the other and it should have nothing to do with the other. I can see how, psychologically, there might be a danger that an improvement in the official flow might be used as an argument to penalize the unofficial flow. That seems to me to be a strong argument for proceeding with timely legislation rather than waiting until a more exhaustive study has been made. I believe the executive branch in the shadow of Watergate would be rather hard put just now to insist on criminal sanctions in cases of unofficial flow of information.

I think, from the executive branch's perspective, this is a bad time to try to get legislation that would impose criminal penalties on newsmen who publish information that they obtained from unofficial sources. Therefore, it might be a good time to enact some legislation that makes the official sources of information better.

Senator ROTII. The latter point was the one I was addressing myself to. The question of whether or not we are better off, if you want to say, for lack of a better word, "limping around" with the present system or whether we should try to develop a new commission or other procedures to help insure the flow of official information, but I take it—

Mr. FRANCK. Excuse me, sir, I gather from what has been brought out in other testimony here and other places that the flow of information, of official information, is highly unsatisfactory to Members of Congress and particularly in the area of foreign relations to which I have been addressing myself. The present law, the Freedom of Information Act, simply doesn't provide any objective legal basis for distinguishing between foreign relations information which must be

kept secret from information that ought to be available to Congress. And the result is that both Congress and the public are having to make very important decisions—the public very important electoral decisions and the Congress very important authorization decisions—on the basis of highly inadequate information.

Senator ROTH. I want to thank you for appearing before the committee and for your very scholarly and helpful remarks.

Again I regret that the chairman and the other members could not be here, but your remarks, of course, will appear in full in the record. Thank you very much.

The committee is recessed.

[Whereupon at 3:25 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, Mar. 9, 1973.]



# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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WEDNESDAY, MAY 9, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; AND SUBCOMMITTEE ON ADMINIS-  
TRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE  
JUDICIARY,

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 3302, Dirksen Senate Office Building, Senator Lawton Chiles, presiding.

Present: Senator Lawton Chiles.

Also present: Alvin From, staff director; Alfred Friendly, Jr., Counsel; Lucinda T. Dennis, chief clerk; Lorelei Williams, secretary; Subcommittee on Intergovernmental Relations.

Senator CHILES. We will open our hearings.

We are particularly grateful to Dr. Rhoads for agreeing to testify about the work of the Interagency Classification Review Committee. Since he has been the chairman a little over 2 weeks, his acceptance of our invitation is a welcome contrast to the invocation of executive privilege last year on behalf of Mr. David Young, the committee's former executive director.

Dr. Rhoads, we take your presence here as hopeful evidence of the revived and renewed spirit of cooperation between the legislative and executive branches of Government.

**STATEMENT OF HON. JAMES B. RHOADS, ARCHIVIST OF THE  
UNITED STATES; ACTING CHAIRMAN, INTERAGENCY CLASSI-  
FICATION REVIEW COMMITTEE, ACCOMPANIED BY RICHARD  
TUFARO, STAFF ASSISTANT**

Dr. RHOADS. Thank you very much, Senator Chiles. I am accompanied by Mr. Richard Tufaro, staff assistant to the Interagency Classification Review Committee.

As you have indicated, I was designated by the President as acting chairman of the committee on April 24 of this year. Although at the request of the previous chairman, Ambassador John Eisenhower, I assisted the committee in an advisory capacity, I am not yet completely

apprised of all of the activities of the committee. Within these limitations, I shall attempt to describe the work of the Interagency Committee since it was established on June 1, 1972.

Let me begin by noting that Executive Order 11652<sup>1</sup> has been in effect for less than a year and the Interagency Classification Review Committee has been operating for less than a year. Both the Executive order and the committee were designed to deal with some very serious problems in the area of classified documents that had evolved over a great many years. For all practical purposes, the classification of documents began during the First World War, grew to maturity during the Second World War, and became the normal practice of most Government agencies during the period of the cold war. Since it evolved in an atmosphere of actual warfare or the threat of warfare, the classification system emphasized security at the expense of publicity, the need for secrecy at the expense of the right to know.

Far too many documents were classified by far too many people—mostly nameless people—with minimum review and no Government-wide monitoring. No one knew or could even reasonably guess at how many classified documents there were. Citizens had no idea of how to go about getting access to the documents. Perhaps worst of all, while the most elaborate provisions had been made for classifying documents and for protecting them, once classified, only minimal provisions had been made for declassifying them. These were serious problems and large problems. It was to deal with them that Executive Order 11652 and the implementing National Security Council directive of May 17, 1972, were issued.

Since it is within the framework of that Executive order and that directive that the Interagency Classification Review Committee must operate, let me review the major changes in the classification system which these documents have produced.

The new order has tightened the definitions of top secret, secret, and confidential classified information. A new general declassification schedule was adopted for speedier, automatic downgrading and declassification, with confidential documents automatically declassified in 6 years, secret in 8 years, and top secret in 10 years. Only four specific categories of classified information are exempt from that automatic declassification. The public is given a right to secure review of exempted material after 10 years, provided the material is identified with sufficient particularity and obtainable with reasonable effort. That review is a mandatory requirement, and the burden of establishing continued classification is on the department or agency. After 30 years all documents are automatically declassified unless the head of the department personally determines that continued classification is essential to the national security or that disclosure would jeopardize a person.

Within this framework, the order and directive establish a series of controls over what material is classified and for how long. These controls include the following:

1. Officials with classification authority must be designated in writing and their names submitted to the Interagency Committee.
2. The classifier of a document must be identified on the document.
3. The classifier is subject to sanctions for abuse.

<sup>1</sup> See Appendix, Volume III of these hearings, Part 3, Executive Order 11652.



4. Top secret classifiers are limited to senior departmental officials and only these officials may apply one of the exemption categories to exempt classified documents from the general declassification schedule.

5. Departmental regulations must be reviewed and approved by the Interagency Classification Review Committee.

6. Departments must establish a data index system of selected categories of classified documents which have permanent retention value.

The responsibility for seeing that these controls are implemented and successful has been given to the Interagency Classification Review Committee, which was established by the order and directive to assist the National Security Council. Its members include the acting legal adviser of the Department of State; the general counsel of the Department of Defense; the Assistant Attorney General for the Office of Legal Counsel, the assistant general manager for administration of the Atomic Energy Commission; the general counsel of the Central Intelligence Agency; a member of the National Security Council staff; and, as of April 24, the Archivist of the United States.

The order and directive specifically provide that the committee shall oversee department actions to insure compliance with the provisions of the order and directive and shall, subject to procedures established by it, receive, consider and take action on suggestions and complaints from persons within or without the Government with respect to the administration of the order and assure that appropriate action is taken on such suggestions and complaints.

Since the Interagency Committee was established, its efforts have been focused on insuring that the controls over classification which I have described are implemented in the departments and agencies. In particular, these activities have included the preparation of current lists of authorized classifiers by name and position, or title and organization; these lists are maintained by all departments and are submitted to our committee. In addition, at the initiative of the committee, the total number of authorized classifiers has been reduced by 63 percent since June 1. The committee continues to monitor quarterly figures submitted by the departments to achieve further reductions where they seem appropriate. For example, the figures cited in our progress report of March 31, 1973, indicate that the Central Intelligence Agency reduced its total classifiers by only 3 percent. The CIA was asked to review these figures to determine whether further reductions could not be achieved. In its most recent quarterly report to the committee, the CIA has reduced total classifiers by 38 percent.

The Interagency Committee has recognized the particular necessity for strictly controlling the number of officials with top secret classifying authority. Since June 1 there has been a 71 percent reduction in authorized top secret classifiers, exclusive of the CIA. That agency has reduced top secret classifiers by 83 percent.

Our committee has reviewed and approved the implementing regulations of all 34 departments affected by the order and directive and the portions of those regulations affecting the public have been published in the Federal Register and ultimately they will appear in the Code of Federal Regulations. Pursuant to these regulations each department has established a senior official responsible for implementation of the order and directive and who also serves as chairman of a departmental review committee.

Detailed instructions have been issued to guide departments in implementing the data index requirement of the National Security Council directive. A series of working groups under the direction of the staff of our committee has assisted the departments in establishing their own data index systems. The data index will permit retrieval of any document indexed. We expect that it will assist the departments and the Interagency Committee in monitoring the implementation of the order and will facilitate automatic declassification, systematic reviews, and public access after declassification.

Early in September of last year Ambassador Eisenhower requested the assistance of the National Archives and Records Service in preparing a series of five quarterly reports with forms and instructions to assist our committee in monitoring the classification program.

These five reports are :

1. "Report of Authorized Classifiers." This is a list of authorized classifiers by name and title, or by title and organization, with totals for each classification category.

2. "Report of Classification Abuses." This is a report of instances of under or overclassification, unnecessary classification, improper marking or improper exemption from the general declassification schedule or other occasions of classification abuse discovered as a result of departmental inspection programs.

3. "Report of Unauthorized Disclosures." This is a report on instances of communication or physical transfer of classified to unauthorized persons discovered by appropriate departmental officials.

4. "Report of Mandatory Declassification Review Requests." This is a log-type report of declassification review requests made pursuant to section 5 of the order reflecting the requester, date of request, subject matter, date and nature of departmental action, costs and other information associated with these requests. The purpose of this report is to insure expeditious and fair processing of all requests and to measure the success of this provision of the Executive order.

5. "Quarterly Summary Report." This is a statistical summary of documents classified by a department during a quarterly reporting period. Departments are also given an opportunity to elaborate on accomplishments in achieving the objectives of Executive Order 11652. This report will be submitted for the first time beginning with the April 1 to June 30 quarter.

In addition to these activities, our committee has established a working group to make recommendations on standards for the classification and declassification of foreign originated classified information and material. At our last meeting on May 2, we directed the establishment of an ad hoc group to study and make recommendations on the use of classification guides by all departments and agencies. In addition, the committee has of course been concerned with various projects related to the declassification of our older classified documents.

1. Since June 1, 1972, the National Archives and Records Service has declassified approximately 35 million of the 160 million pages from the World War II period. We still anticipate that this project will be completed by 1975.

2. Eleven volumes of the Foreign Relations series were published by the State Department last year, the largest number ever published in a single year and an important step in moving toward the goal of



reducing the lag in publication from 26 to 20 years as President Nixon directed.

3. Three hundred and fifty mandatory declassification review requests were received between June 1, 1972, to March 31, 1973; 197 of these were granted in full; 26 in part; 79 were denied in full and 48 were pending at the time of the report.

4. Many departments have initiated their own reviews of existing classified documents to downgrade and declassify those no longer requiring protection in the national security interest. Of particular significance are the projects of the Atomic Energy Commission and the Department of Defense in its industrial security program.

Mr. Chairman, at this point I would like to focus a little more specifically on the portion of the order and directive dealing with public requests for classified documents, what the Executive Order 11652 calls "mandatory review of exempted material." I believe this area is of particular interest to this subcommittee.

As you know, this is a new feature introduced by section 5 of the order and further implemented by Section III of the directive. These sections establish procedures whereby any member of the public or any Government department can initiate a mandatory declassification review of any classified document 10 or more years old.

Although some difficulties have been encountered in implementing these procedures, the overall results to date have been positive; 74 percent of all declassification requests from June 1 of last year to March 31 of this year have been granted in whole or in part. Only four have been appealed to the departmental committees. Three have been appealed to the Interagency Committee.

Some of the initial problems, which were attributable to the newness of the system and our inexperience in dealing with these procedures, have been resolved. When the question of reasonable fees to be charged requesters first came to the attention of our committee, for example, it was determined that fees would not be charged unless the requested documents were located and made available. Furthermore, the committee decided that fees could only cover the cost of locating the documents and reproducing them if copies were requested. It should not cover the time incurred in reviewing them to determine whether continued classification might be required.

Similarly, the committee has been concerned with insuring that declassification requests are processed within the time periods set forth in the NSC directive and that requests are not improperly denied on the grounds of insufficient particularity or burdensomeness. Accordingly, a report from each agency on mandatory review requests was developed and has been in use since February. Less formal procedures were utilized prior to that date, but we are now satisfied that the information furnished by departments will permit the careful monitoring of these procedures which Executive Order 11652 intended. Our committee will know who requested what material, what action was taken on the request, and how long it took.

Other difficulties reported by some requesters with the mandatory review procedures stem from a misunderstanding of their purpose and scope. These procedures were not intended to and cannot solve the problem of large volume classification. It appears that some persons anticipated that mandatory review requests could be utilized to initi-

ate major government declassification projects involving large numbers of classified documents. For example, the State Department estimated that a New York Times request for "the U.S. Lend-Lease Agreement with the Soviet Union negotiated by A. Harriman [and] the lists of military, industrial and raw materials delivered to the Soviet Union under the agreement (1942-43)" would have required a declassification review of over 600,000 pages of records. Such ad hoc reviews of large quantities of records are simply beyond the Government's resources at the present time.

Senator CHILES. Doctor, that doesn't seem too plausible to me that the State Department would have had to review 600,000 papers to determine whether that lease lending agreement and the list of agreements could be declassified or not. Surely most of the 600,000 pages that we are talking about are invoices, pieces of equipment, a truck, or something like that. And it seems like to me they can be looked at and a decision made as to whether there was anything in those papers that couldn't be declassified without looking at all 600,000 pages.

I just have a hard time buying that argument. It just seems to me they would know just from looking at the agreement and from looking at an awful small volume of the papers whether they could declassify. I think that is an excuse. I don't think they had to look at the whole 600,000 pages. I think once you have gotten into the invoices, once you have gotten into the list of equipment, there was nothing else to it.

Dr. RHOADS. I think you may be quite right that not every page of the 600,000 would have to be individually scrutinized. Certainly we found that in some of our—

Senator CHILES. Excuse me, but obviously what the Times was really interested in was the negotiations, the arguments leading to the negotiation, and that would have been an awful small number of pages, and then they kind of wanted to find out what equipment was under the agreement.

I will let you go on.

Dr. RHOADS. The major declassification efforts envisioned by the order and directive rest on the 30-year rule, which should result in the declassification of virtually all classified records at that time, and on applying the automatic declassification schedules to records created after June 1, 1972. We hope that as we develop further experience, declassification review can proceed at a more rapid pace so as to increase public access to this information.

Another limitation of the mandatory review provision is that it, like the Freedom of Information Act, is document oriented. A requester can ask for declassification review of particular documents. They can be located, reviewed, declassified, and made available. However, requests not for the documents themselves, but for some kind of summary of their contents which would have to be prepared by the agency are a different matter. Thus, as Mr. Harding Bancroft indicated in his testimony of April 11, a request for the Gaither Report of 1957 produced its declassification for the New York Times. But that same newspaper's request for a "documentary assessment" of the voluminous material prepared within the Department of Defense in answer to Secretary MacNamara's "100 questions" of 1961 had to be turned down. Mr. Bancroft's criticism of the Department of Defense is, I think, based upon a misunderstanding of this aspect of the problem.



Our committee recognizes and appreciates the difficulty of requiring that requesters draft a request with sufficient particularity so as to permit department officials to locate the appropriate documents. Since exact information about the existence of Government documents is often not known, it may be extremely difficult for a requester to comply. This problem, of course, is not unique to requests for classified documents. It applies to any request for Government documents in general. Moreover, it can be overstated. There are many resources available to help a thorough researcher in narrowing his request by date, event, office, or individual.

We also believe that more positive steps have been taken by this committee to see that this test is not abused than is the case in any other area of the Freedom of Information Act. The quarterly report of mandatory declassification requests to which I have previously referred to will permit us to carefully monitor departmental actions for this kind of abuse. The data index system which we are implementing will also contribute to a better solution of this problem in the future.

Finally, in considering the time limitations proposed in S. 1142 for processing Freedom of Information Act requests, it may be useful for the subcommittee to consider the experience of our committee in dealing with mandatory declassification review requests. Section IIIB of the NSC directive sets forth time limitations for processing mandatory declassification requests. It provides:

The office which has been assigned action shall thereafter make a determination within 30 days of receipt or shall explain the reason why further time is necessary. If at the end of 60 days from receipt of the request for review no determination has been made, the requester may apply to the Departmental Committee established by Section 7(B) of the Order for a determination. Should the office assigned action on a request for review determine that under the criteria set forth in Section 5(B) of the Order continued classification is required, the requester shall promptly be notified, and whenever possible, provided with a brief statement as to why the requested information or material cannot be declassified. The requester may appeal any such determination to the Departmental Committee and the notice of determination shall advise him of this right.

Section 111C further provides that the departmental committee must make its determination within 30 days. Furthermore, a requester is entitled at any time to file a complaint with the Interagency Classification Review Committee regarding the administration of these provisions. In our meetings with members of the public, we have at all times encouraged requesters to notify the Interagency Committee of complaints regarding the administration of this provision.

Based on our experience to date, the time periods set forth in the directive appear to be realistic. Declassification requests are usually drawn in terms of dates, events, personalities, and offices. Most frequently, by their terms they do not focus on a specific document. Accordingly, agencies must expend considerable effort in attempting to locate documents which are responsive to the request. These documents may or may not be in present files. They are frequently located in Federal records centers or archival repositories, often at some distance from the office where the request is received. The search may turn up one or more documents of a number of pages in length. Once the documents are located by the records managers, they must be circulated to appropriate high-level officials in the agencies who have the expertise required to determine whether continued classification is necessary. It

may be determined only after review that additional comments are required from other agency officials or from other departments or agencies. On occasion, the declassification request will also require the concurrence of a foreign government. To the extent that the document raises other Freedom of Information Act issues, it may also require review by still other agency officials. Insofar as possible, agencies have been advised and do attempt to proceed on these matters simultaneously.

On the basis of our most recent quarterly reports, we are encouraged that in most cases departments will be able to respond to declassification requests in the time periods set forth in the directive. Our committee has been monitoring these reports and bringing cases of undue delay to the attention of appropriate departmental officials.

To sum up, over the past year, the Interagency Classification Review Committee has been active in implementing the controls of the order and directive designed to reduce the amount of material classified and speed its declassification. Programs for the declassification review of our historical classified documents have continued on schedule. The committee feels it can be justifiably proud of its work in this area. We believe that in many respects our work has been more forthcoming than in any other area of the Freedom of Information Act. In short, we feel that there is reasonable basis for optimism regarding the prospects for the long term success of the classification reform which President Nixon initiated a year ago.

Thank you very much.

Senator CHILES. Thank you very much, Dr. Rhoads, for your thorough and helpful testimony. I have a list of specific questions about the operations of the Review Committee, the provisions of Executive Order 11652, and some of the recommendations for legislative action which the Congress has under consideration. The list is fairly lengthy and if time runs out before we can complete the questions, I hope you would agree to provide written answers to the questions we are not able to cover.

Dr. RHOADS. I'll be glad to.<sup>1</sup>

Senator CHILES. Before beginning that part of the inquiry I would like to raise some general philosophical questions, that is, around classification practices. Yesterday one witness advocated legislation that would define in very restrictive terms the kinds of information which deserves protection from improper or untimely disclosure. Another suggested scientific secrets should only be held secret for 1 year at most. A third argued for a 3-year limit on automatic secrecy beyond which classification could only be continued if the Government could make a convincing, positive case.

All of these suggestions are interesting and worth discussing. The basic standard for classification seems to be the one that Mr. William Bundy raised when he said that the rub is who is to decide whether information deserves secrecy and for how long.

From your view and that of the executive branch, it would seem to be the decision rests with those who administer the classification system and ultimately with the review committee. I wonder if that arrangement does not make you the judge of your own case? What would you see the objections to be to removing the final review of classifica-

<sup>1</sup> See p. 337.



tion disputes outside of the executive branch and placing it in the courts, in the Congress, or in some independent arbiter established by law?

Dr. RHOADS. Well, Senator Chiles, I should preface whatever I say by making it clear that the Interagency Committee does not have as its role the consideration of various legislative ideas or initiatives in this area. Its job is to make sure that the present system works just as effectively and as much in the public interest as is possible. It does seem to me that the great body of expertise as to what constitutes sensitive material in terms of national security probably does rest with the large numbers of experts in the executive branch and I think it is also clear that the persons who are making many of the decisions with regard to classification or declassification are not the people who are policing the system. There is another area of expertise that I believe is brought to bear on such matters, and——

Senator CHILES. But, Dr. Rhoads, you seem to be saying that an independent arbiter would not have the expertise to be able to consider these. Yet we made a decision that 30 years is the cut-off time, and everything on the other side of that we are going to declassify unless there is some reason why not. Is there any reason why that decision, that 30 years, couldn't be cut back, whether it was 10 years or 5 years, and then allow the case to be made by the agency or by the individuals that feel that secrecy should be maintained, and just have the case made before an independent arbiter?

Dr. RHOADS. I think that any period of time is necessarily arbitrary, and I am not sure, for example, that the 30 years is necessarily better than 28 or 32. A time period had to be picked, and we are working on that thesis. As a matter of fact, under the new Executive order, the burden of proof is on the classifying departments and agencies to keep materials classified. This is, I think, one of the really important and significant differences between Executive Order 10501 and Executive Order 11652.

Senator CHILES. I think that is true. I think that is a significant change. I think the problem I see with that now is that the trier of the fact is still in effect the executive branch, and therefore that lends itself to covering up secrets or a mistake or something else that that branch wants to cover up. Perhaps that wouldn't happen if you had an independent arbiter. And also it still gets down to the question not really in every instance of what happens, but what could happen and what the general public feels could happen and is happening.

Dr. RHOADS. Well, that may be true. I would like to see us have an opportunity to try to make this system work. If it is found that as time goes along there are faults in it, I would like to see those faults corrected. I don't think we have had enough time yet to demonstrate that conclusively.

Senator CHILES. All right. I think one of the things that we in the Congress need to continually be trying to design is accountability and right now there appears to be a flaw in accountability here if you can't get an outside view into this.

Dr. RHOADS. Let me make one point, if I may, Senator Chiles. You spoke of the possibility of an agency covering up misclassifications or a review of misclassifications. Well, under the present Executive order for the first time there are windows on this process. There are people

from other agencies who are looking over the shoulders of each classifying agency.

Senator CHILES. I think that is true, and as between the agencies, are you having a check as between the agencies?

Dr. RHOADS. We have some checks and balances in here and some oversight, some surveillance, that I think is a very healthy thing and that did not exist a year ago.

Senator CHILES. Yes. Well, I think again just carrying that further, the question is whether that check should go beyond the executive branch.

Now, you are checking within the executive branch, because you are opening the windows into the agencies. Should we not open it further into some reviewing authority outside of the executive branch?

Let me get into some specific questions.

What is the size of the full-time staff of the Interagency Classification Review Committee and what is your operating budget?

Dr. RHOADS. There are presently two full-time staff members: Mr. Tufaro and his secretary. In addition to that, the committee's staff has been receiving a good deal of technical assistance from other agencies of the Government.

If I may put on my hat as Archivist of the United States for a moment, we have been lending the committee a good deal of support in development of the new forms, in development of a government-wide handbook in an effort to have a more effective across-the-board system and in certain other technical ways.

I believe you have some assistance of the same general kind from other agencies, Mr. Tufaro?

I am sorry, I don't know what the budget for the committee is, Senator.

Mr. TUFARO. It's just salaries.

Dr. RHOADS. There is no separate line item.

Senator CHILES. I see.

Dealing with numbers, can you tell me how many of the 35 million pages of the World War II documents declassified in the last year or so were less than 30 years old at the time they were declassified?

Dr. RHOADS. I could come up with an estimate for you. Most of them are about 30 years old. Some of them are less than that because it is not always most effective to cut off your review at the end of a year when you are going through a file of documents, and so we have gotten this side of the 30 year line in a number of instances.

Senator CHILES. Would you say that is 5 percent or less than 5 percent?

Dr. RHOADS. I imagine so.<sup>1</sup>

Senator CHILES. Less than 5 percent? I have some trouble with the figure of 34 agencies with classification authority, Dr. Rhoads. Since the Secretary of Agriculture, the Chairman of the Interstate Commerce Commission, the Secretary of Labor and 12 of his subordinates, and the top 12 officers of the U.S. Information Agency obtained such authority by special Presidential order, would 38 agencies not be a more informative number to use?

<sup>1</sup> In correspondence with the subcommittee after the hearing, Dr. Rhoads amended this response to say: "Our estimate would be closer to 30 percent, although in most cases the documents are dated prior to Jan. 1, 1946."



Mr. TUFARO. The figure 34 is departments and agencies affected by the order and directive which includes some that previously had authority and no longer do but would, for example, be reporting on mandatory declassification review requests.

I think that the figure is actually 29 including Agriculture, ICC, and Labor, which were not previously designated. The original number was 25.

Senator CHILES. Can you tell me, are those departments that I just read out the, for example, the ICC, Labor, and so on, are they covered?

Mr. TUFARO. They are included in the number of 34.

Senator CHILES. They are included?

Mr. TUFARO. Yes.

Senator CHILES. Do you know why the Assistant Secretary of Labor for Occupational Safety and Health and the Assistant Secretary of Labor for Employment Standards need such authority?

Mr. TUFARO. The Labor Department presented the request to our committee and indicated that they are involved in making policy recommendations in the area of health and labor, possibly labor strikes, which have national security implications and on that basis, our committee recommended to the President that they be designated classification authority. As you can see, the authority to exempt was withheld, so that they can only classify up to a maximum of a 10-year period.

Senator CHILES. Is this why they were given power in a special order rather than in Executive Order 11652?

Mr. TUFARO. Yes; that is right, in order to withhold it, otherwise it could have been subdelegated.

Senator CHILES. In your testimony, you say 350 mandatory review requests were presented between June 1 and March 31, June 1, 1972, and March 31, of 1973. Who presented them, and did they originate from Government employees? Did any originate from Government employees?

Dr. RHOADS. At least one of those mandatory review requests—and this was a very large one—came out of the National Archives and Records Service.

Senator CHILES. What was that?

Dr. RHOADS. Most of them were from members of the public and historians and journalists.

Senator CHILES. What was the one from the National Archives?

Dr. RHOADS. This was a request for the mandatory review of classified papers among the papers Clark Clifford deposited in the Truman Library.

Senator CHILES. What happened to that request?

Dr. RHOADS. Most of the material has now been declassified, I believe. This was a request that involved about 1,000 pages which were distributed among 11 originating agencies for review. I think there may have been a little bit of foreign classified material in there and we don't have all of the returns in on all of the documents, but most of them have been declassified.

Senator CHILES. Did I understand correctly only three such requests came as far as the Interagency Review Committee?

Dr. RHOADS. That is correct.

Senator CHILES. What happened in those cases?

Dr. RHOADS. In the case of one of them, a request for release of the Gaither Report, that was granted. Another one came out of the CIA

relating to the overthrow of Arbenz in Guatemala, in 1954. The CIA has asked to have the matter returned to them because they think that they are going to be able to resolve it in a way that would be satisfactory to the appellant and we expect some answers on that very soon. The third one had to do with certain records originated in the National Security Council in the early fifties, relating to Korea and Taiwan, and the Committee has made recommendations on that request to the Chairman of the National Security Council, Dr. Kissinger, and that is on his desk now.

Senator CHILES. The recommendation is to release that?

Dr. RHOADS. Yes, sir.

Senator CHILES. How is the vote taken in the Review Committee? Does that require unanimous vote?

Dr. RHOADS. No; a majority vote.

Senator CHILES. Has the Review Committee tried to formulate any definitions itself as guides to decisions in these disputes, or are you operating on a case-by-case basis?

Dr. RHOADS. We have some procedures that we have been developing that we hope to take final action on in our meeting early in June, which will be applicable to the handling of all appeals to the committee.

Mr. TUFARO. If I could explain that a little further? That is appellant procedures; what has to be furnished, what votes are required. It is not substantive explanations of any of the classifying standards. I'm trying to be responsive to the question.

Senator CHILES. Fine. I think we would still be interested in having a copy of those.

When disclosure is denied, do you cite specific reasons for the denial informing the requesters of decisions?

Mr. TUFARO. Are you talking about things that have come to the Interagency Committee?

Senator CHILES. That is right.

Dr. RHOADS. We have had no denials as of yet, but it is certainly my feeling that the appellant is entitled to a reason and that he certainly should have it.

Senator CHILES. Do the agencies, when they deny a request, give their reasons for so doing?

Dr. RHOADS. We don't get copies of their letters. I would certainly hope that they do give reasons. In fact, in the NSC directive, agencies are admonished to provide the appellant with reasons.

Senator CHILES. Fine. I think whenever possible they should provide a brief statement as to why the requested material cannot be declassified.

Dr. RHOADS. I agree.

Senator CHILES. On the review process, the Justice Department witness last week testified in support of criminal penalties on officials who disclose classified information and said that such officials had administrative channels to use in seeking a change in classification marking if they thought it was improper, and so if they were turned down going through channels, he maintained they should be punished for going outside. It is realistic to expect officials to use those channels? Isn't an employee who contests a classification going to be regarded by his superiors as poor promotional material, to use a statement Mr. Bundy suggested yesterday?



Dr. RHOADS. Senator, in view of the great deal of effort that has gone on over the last year and the amount of interest that the President himself has taken in making this new system work, it is hard for me to conceive of anyone penalizing an employee who was pointing out to his superiors cases of improper or overclassification. I should think he would be awarded and applauded for that rather than the contrary.

Senator CHILES. I would now like to move on to the practice within each of the 34 agencies that obtain classification authority under the new order. You said the Review Committee had gone over the implementing regulations for each agency. Have all 34 agencies actually put the implementing regulations into effect?

Dr. RHOADS. Yes, sir.

Senator CHILES. When did the last agency put its rules into effect, and do you know what agency was the last one to do so?

Dr. RHOADS. We can supply that for the record.<sup>1</sup>

Senator CHILES. Fine. You have permitted an exception for the Defense Department to the requirement that the classifier's name appear on the information he classifies. And then that is justified in your testimony by a rapid personnel turnover. That is kind of puzzling. Why can't the classifier give both his name and his position?

After all, the inhibitory effects against overclassification seem to depend on personal accountability. Why should the Defense Department, with more than half of the personnel in the whole Government who are authorized to classify, 8,973 out of 17,883, exclusive of the CIA, be exempt from this very sound change in the rules?

Dr. RHOADS. I don't know the answer to that question, Senator. I will try to find that out.<sup>1</sup>

Senator CHILES. Fine. Does the Executive order or any of the implementing regulations establish new positions in any of the 34 agencies for officials whose sole activity shall be to review and declassify, and were such positions considered and what were the reasons for not creating such jobs?

Dr. RHOADS. The only situation with which I am familiar is in my own agency, the National Archives and Records Service of GSA. Approximately 100 positions were created to carry on the work of reviewing material 30 years old and most of those positions have now been filled. These people have been very busy and very effectively busy. I think, based on the statistics we have been able to present.

Senator CHILES. Do you know whether you can get us information from the other agencies, whether they have actually put on new personnel, requested new personnel?

Dr. RHOADS. I might say that we do know that some of the agencies, particularly in the Defense Department, have assigned people to work with us on the declassification of their records, which are in the National Archives. Whether those represent any kind of a net gain in employment, I don't know.

Senator CHILES. Do you have any information on that? Could you get that?

Dr. RHOADS. All right. We would be glad to.<sup>1</sup>

Senator CHILES. You have also dealt with the reviewing agency classification guides through an ad hoc group established last week. There has also been a good deal of controversy about the value of these

<sup>1</sup> See letter to Alfred Friendly, Jr., subcommittee counsel, from James B. Rhoads, dated May 24, 1973, p. 337.

guides. Do you see any way to standardize them? Is that what your review is aimed at doing?

Dr. RHOADS. That is certainly the major purpose of the review, to make sure that you have consistency both within an agency and from one agency to another insofar as possible, and to eliminate the tendency of an individual to go overboard in one direction or another.

Senator CHILES. The subject of classification guides brings up a problem of different labels for different kinds of information. The Executive order says that the only classifications are Confidential, Secret, and Top Secret. The Atomic Energy Commission uses the letter code of Q, P, and L for its restricted data. Additionally, the CIA has special designations for certain technological projects and others for information gathered by aerial reconnaissance. There are special categories for what is called communications intelligence. I believe these actual terms themselves are classified.

How does the proliferation of categories square with the Executive order?

Dr. RHOADS. The Atomic Energy Commission and its situation, which is established by statute, is specifically recognized in the Executive order. There is also a provision in the Executive order, section 9, special departmental arrangements:

The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods, and cryptography.

My understanding is that that provision is designed to take care of the situation that you have referred to. I personally know very little about what these arrangements are.

Senator CHILES. What does the review committee propose to do to standardize classification where it is not yet uniform?

Dr. RHOADS. Well, our ad hoc group is to review the classification guide system and to assess its present effectiveness and its viability for further extension. That is the central device that we are using.

I think, too, that the fact that once a month people from the major classifying agencies get together in the interagency committee and discuss these problems, that is going to be helpful in developing a commonly held conception of exactly what the provisions in the Executive order do mean.

I suppose, this being a large Government and an imperfect world, there are always going to be some inconsistencies, but we certainly want to narrow those down and eliminate them to the extent possible.

Senator CHILES. Then we have the definition in the Executive order of what should be in each category. Section 1 speaks of protecting information and material in the interests of the national defense or foreign relations of the United States, and then combines these terms as national security. Why use the term "foreign relations" when section 552 of title 5 uses the phrase "foreign policy?" The relations terms seems to be a broader and less precise term in this context. What purpose is the departure from the statutory precedent meant to serve?

Dr. RHOADS. I don't know the answer to that. I am not sure that that difference has any significance, or that it was intended to suggest a difference. I have to plead ignorance on that one, sir.



Senator CHILES. Also, the introduction of the words "national security" go beyond the language of the Freedom of Information Act's permissive exemption from automatic disclosure. Again, why broaden the definitions when Congress has sought to define them as narrowly as possible?

Dr. RHOADS. I am sorry to have to say again that I don't know the answer to that one.

Senator CHILES. We understand because of your having this position for just 2 weeks.

Dr. RHOADS. I appreciate your indulgence.

Senator CHILES. Next, we come to the four exemptions from automatic downgrading and declassification under the Executive order, particularly the third exemption in section 5(B), "Classified Information or material disclosing a system, plan, installation, project, or specific foreign relations matter the continuing protection of which is essential to the national security."

Leaving aside the question raised at the start as to who is to decide that such exemptions are permitted, do you not find that language broad enough to shelter all sorts of potentially embarrassing information whose actual effect on the national interest is at least highly arguable? I think, for example, of the ITT's attempt to involve the CIA in rigging elections in Chile, that is a foreign relations matter if ever there was one. I wonder how the language would work to conceal information about a project such as the C-5A transport and the \$2 billion increase in its cost estimates. Can you comment on those?

Dr. RHOADS. It seems to me that elsewhere in the Executive order, Senator, it is made quite clear that security classifications are not to be used as coverups for malfeasance or any of the kinds of things that you have referred to. My interpretation of the order would be that these are not the kind of things that the order envisions could or should be classified in the first place, let alone exempted from the general declassification schedule.

Senator CHILES. Well, I am very delighted to hear that that is your interpretation of the order. I think this again reaches the point I was making earlier on accountability, the need to know that there is some outside check that these exemptions are not being used in that way.

Then I wonder about exemption 1, permitting the withholding of material furnished in confidence by foreign governments. Is that not the sort of provision which permits us to go on pretending officially that we don't have any airbases in Thailand when the whole world knows where they are and what planes are based there and what they have done?

Dr. RHOADS. Well, my understanding of that provision is that it is designed to take care of a situation where a foreign government issues information or documents of its own relating to security matters affecting perhaps both countries, and where the giving of that information to us is predicated by the foreign government on the understanding that it will be kept in confidence.

Senator CHILES. Do you think that exemption is limited to instances where they have actually furnished material or information?

Dr. RHOADS. I know there are many cases where foreign governments have furnished information and documents to this Government. This has been going on at least since the Second World War

period, and we see many examples of them in materials we have gone through in the National Archives. My interpretation of this provision is that it is designed to cover that sort of thing.

Senator CHILES. As you probably recall, the Wright Commission on Government Security in 1957 made a strong recommendation that the category "confidential" be dropped from the classification system. Do you know why that recommendation was not adopted? Why in fact do we need even two categories?

A witness yesterday testified that the term "Secret Defense Data" would be broad and permissive enough a definition to maintain secrecy for material deserving it.

Dr. RHOADS. To answer the first part of your question specifically, I don't know why "confidential" was retained, other than it was simply a recognition that there are levels of sensitivity. And certainly I would hope we never got into a situation where all classified material would have to have the kind of elaborate physical safeguards and transmission safeguards, that now apply to top secret material. That would be horribly expensive, and it seems to me it is prudent to recognize that some things are more sensitive than others. Whether we need two grades instead of three is something that I would have no well-formulated opinion on.

Senator CHILES. The Wright Commission also recommended creation of a central security office to review the classification problem and advise on its improvement. That office would not have had review authority on specific documents or files. Do you regard the Interagency Classification Review Committee as an implementation of the Wright Commission's recommendation?

Dr. RHOADS. As I understand it, it is that and more.

Senator CHILES. I don't suppose you would have any way of telling us why it took from 1957 to 1972 to implement?

Dr. RHOADS. That is another one I am going to have to plead ignorance on.

Senator CHILES. Thank you very much, Dr. Rhoads.

One question. What are the regulations governing access to classified information for Members of Congress and their staffs?

Mr. TUFARO. It seems to me that we tried to get a readout on that from the Office of Legal Counsel at Justice at one point when a question came in, and if I recall, there are no restrictions imposed on Members of Congress in terms of access to classified information, but there is nothing in the regulations or statutes that answers the question.

Senator CHILES. Can you get for us the various current forms that the agencies have which they present when Congressmen or their staffs seek classified information?

Dr. RHOADS. We will certainly make that effort.

Senator CHILES. And if you could, we would like to have any of the 34 agencies approved regulations too.

Dr. RHOADS. We would be glad to supply those.

Senator CHILES. None of those are classified?

Dr. RHOADS. No, sir.

Senator CHILES. Thank you very much.

[The material supplied follows:]



MAY 24, 1973.

Mr. ALFRED FRIENDLY, Jr.,

*Counsel, U.S. Senate Committee on Government Operations, Subcommittee on Intergovernmental Relations, Washington, D.C.*

DEAR MR. FRIENDLY: During my appearance before the Senate Subcommittee on Intergovernmental Relations on May 9, 1973, you requested that certain information be furnished for the record. Some of the information was available from the records of the Interagency Classification Review Committee. Other responses have been prepared on the basis of information submitted to us by the member departments of the Interagency Committee.

1. *Question. Could you furnish the Federal Register citations of the departmental security regulations and the dates of approval by the Interagency Classification Review Committee?*

Response. Attachment A is a list by departments showing the date regulations were approved by the Interagency Committee, the date of publication in the Federal Register, and the Federal Register citation.

2. *Question. Why is the Defense Department authorized to use title and organization on classified documents to show the authorized classifier rather than name and title?*

Response. Defense Department activities are worldwide, and designations are similarly dispersed. The total number of designations, although held to the minimum absolutely required for efficient administration, is larger than those of any other department or agency of the government. There is a relatively rapid turnover of incumbents of designated positions, especially because the positions are largely filled by military personnel whose duty assignments are subject to rotation. Despite the turnover of incumbents, a particular incumbent can be identified by name within a reasonable period when required.

In view of the foregoing Defense Department system, where a document is originated and classified by an original classification authority, the identity of the classifier is shown by the title and organization of that authority. Should the occasion arise, the title and organization can be linked with a name within a reasonable period.

Data is not available to the Defense Department at this time to show how frequently it may be necessary to follow an audit trail back from a classified document to a responsible original classification authority. Of course, such a situation will arise and when it does, the audit trail must be effective. Nevertheless, at least until information is developed to show that the name as well as the title and organization of an original classification authority should be cited, the Defense Department finds it more economical of time and resource to use, as it now does, only the title and organization of the original classification authority. It should be noted that this exception was discussed and approved by the Interagency Classification Review Committee at one of its early meetings.

3. *Question. How many individuals have been specifically designated for positions established for declassification work since June 1, 1972 and what requests have been made for additional appropriations to carry out this work?*

Response. The Department of State has indicated that it has not specifically designated additional individuals or slots for declassification work, but it has requested \$94,000.00 in the 1974 Budget for consultants to review materials for possible declassification.

The Atomic Energy Commission has responded that 122 persons among the 4,656 individuals who are authorized to classify information by the AEC and its contractors have had declassification authority for several years. This authority was continued under Executive Order 11652. No additional departmental slots were requested for this purpose. It has been the practice of the AEC to designate additional temporary declassification authorities during special declassification review programs, the first of which was held in 1955. Since the declassification work pursuant to Executive Order 11652 is an extension of the established declassification review program, the AEC has not so far requested any additional appropriations for that work.

The Central Intelligence Agency has three employees utilized exclusively on declassification review. Many other employees become involved in declassification decisions and requests and several spend a substantial portion of their time in this area. No additional slots have been established for this work, nor has the CIA requested additional appropriations for such work.

The Department of Justice has seven people specifically designated for declassification work since June 1, 1972. It proposes to add four additional persons for such work. The department, in addition, has requested an appropriation of \$153,000.00 for its classification functions generally, including the establishment of a data index system.

Nineteen Department of Defense people are specifically designated for declassification work at the seat of government. These individuals are spending full time in assisting the Archivist of the United States to carry out the President's program for the declassification and release of World War II records. In addition, over 800 military reservists have been involved in this effort, representing over 35 man years of declassification work since the start of the aforementioned program in early 1972.

The Office of the Joint Chiefs of Staff in 1965 established a team comprised of one full time civilian, one full time military man and one part-time civilian for the exclusive purpose of reviewing World War II records of the Joint Chiefs and Combined Chiefs of Staff for declassification. As of May 1, 1973, that team had declassified approximately 222,000 documents. The team continues to operate at this time.

Certain offices of the Defense Department are specifically designated to handle declassification requests under the 10 year mandatory review program provided by Executive Order 11652. These include but are not limited to the Office of the Assistant Secretary of Defense (Comptroller); Office of the Assistant Secretary of Defense (Public Affairs); Office of the Chief of Information, Department of the Army; Office of the Chief of Information, Department of the Navy; and the Office of Information, Department of the Air Force. The specific number of people involved in declassification work on a part-time basis in these offices and others throughout the department is not known. However, approximately 200 requests for declassification under the 10 year program have been processed by these offices since June 1, 1972. Funds in the amount of \$450,000.00 internally earmarked for full time declassification work were added to the FY 1973 Defense Department Budget which was presented to Congress.

*4. Question. What are the departmental policies on security clearance standards for members of Congress and their staffs and what forms are utilized in granting such persons access to classified information?*

*Reponse.* The Department of State generally authorizes access to national security information on a need to know basis to all members of Congress. Such information is made available with the understanding that it will be held in confidence, appropriately safeguarded, and not released to unauthorized persons, including staff members who have not received appropriate clearances. Staff members of the House Foreign Affairs Committee, as well as other Committee staff members with a "need to know," may have access to Top Secret information after full field investigation; the State Department normally obtains the results of such investigations from the Department of Defense. Committee staff members with a Top Secret clearance may be given access to Secret information on a "need to know" basis in connection with a particular activity through a "name check" performed by the State Department. Attachment B gives the forms used by the State Department to obtain necessary security clearances.

The Atomic Energy Commission indicates that Members of Congress are granted access to Restricted Data when such access is needed in the performance of their official duties. Employees of Congress or of a Congressional committee (other than the Joint Committee on Atomic Energy), who need access to Restricted Data, must possess a security clearance based on an investigation and report to the AEC by the Civil Service Commission or the Federal Bureau of Investigation and a determination by the AEC that permitting such access will not endanger the common defense and security. This requires the prior submission by such staff members of Form AEC-1, "Personal Security Questionnaire" an FBI fingerprint card, and Form AEC-15, "Security Acknowledgment" (Attachment C). Staff members of the JCAE are permitted access to Restricted Data based on assurance of the JCAE that the FBI has conducted a full field investigation and JCAE has favorably reviewed the reports.

The Central Intelligence Agency indicates that it conducts no investigation or inquiry to establish the trustworthiness of Members of Congress for access to classified information. In depth classified briefings by the CIA are limited to the members of its oversight subcommittees in the House and Senate. Other members and committees are furnished classified briefings only upon request and only after clearing with these oversight subcommittees. The CIA furnishes classified



information to committee staff members only after it has ascertained that the staff man has been given the appropriate level of security clearance by another executive department and when there is the requisite need to know. With rare exceptions, the CIA has not furnished classified information to the personal staff of Members. When exceptions have been necessary, the individuals have been cleared under the standards of E.O. 10450.

The Justice Department has indicated that it has no departmental policy or guidance on security clearance standards for Members of Congress and their staffs. Should such clearance become necessary, it would be handled through the office of the Deputy Attorney General, although no set procedure has been established.

As provided in 7-106a, DOD 5200.1 R, the Defense Department does not "investigate" or "clear" Members of Congress. Members of Congress by their election to office are authorized to have access to classified Defense information. Such information is made available with the understanding that it will be held in confidence, appropriately safeguarded, and not released to unauthorized persons.

There has been an informal, but well understood, arrangement for a number of years between representatives of the Secretary of Defense and Chairmen of certain committees of Congress whereby the Department undertakes to issue security clearances for staff members (See Section III. G of Department of Defense Directive 5148.5 in Attachment D). Similar arrangements have also been made more recently with selected Members of Congress requesting this service for their individual staffs. The Department of Defense issued clearances are not always based on DOD investigations. For example, the FBI conducts almost all of the investigation used by DOD for granting clearances to staff members of the following committees:

Senate: Appropriations Committee, Committee on the Judiciary, Committee on the Armed Services, Foreign Relations Committee.

House: Appropriations Committee, Committee on the Judiciary.

Joint: Joint Committee on Atomic Energy.

For other elements of Congress, DOD clearances are generally based on DOD investigations.

The procedures are these: the Assistant Secretary of Defense (Legislative Affairs), on behalf of the Secretary of Defense, receives a written request from a committee Chairman, or an individual Member of Congress, requesting a DOD security clearance in conjunction with the named staff member's official duties. Accompanying the request are a completed DD Form 398 (Statement of Personal History), a DOD secrecy agreement, and an FBI fingerprint card, which are turned over to the Security Division, OSD, for processing and evaluation. The Security Division requests either a national agency check or a background investigation, depending upon the level of clearance required, and evaluates the information as a basis for granting a clearance. The decisions are furnished to the ASD (LA), who advises the committee Chairman or the individual Members of Congress, in writing, when the legislative staff member has been granted a security clearance. At the same time, advice is furnished as to the requested level of clearance granted, the fact that it is on a need to know basis, and is restricted to use on matters related to official duties. At that time, an SD Form 176, OSD Certificate of Clearance is issued. The Chairman of the committee, or the Member of Congress is requested to advise DOD when the individual no longer has the requirement for the clearance or when he terminates his employment.

At the beginning of each new session of Congress, a list of staff members currently holding security clearances is sent by DOD to each committee Chairman and individual Members of Congress having previously cleared staff members for verification of the continuing need for the staff members' security clearances.

Prior to each release of classified material by the Defense Department to staff members, the next administrative step is to check the Security Division, OSD files to verify that the individual has in fact a security clearance. Thereafter a need to know determination must be made before actual release. Appropriate forms are contained in Attachment D.

I hope this information will be of assistance to you.

JAMES B. RHOADS,  
Acting Chairman.  
*Interagency Classification Review Committee.*

## ATTACHMENT "A"

## DEPARTMENTAL REGULATIONS ON CLASSIFICATION AND DECLASSIFICATION

Department	Date approved by ICRC	Date published in Federal Register	Federal Register citation
AEC.....	Aug. 1, 1972	Aug. 3, 1972	37FR15624
State Department (USIA, AID, OPIC).....	do.....	do.....	37FR15624
Defense Department.....	do.....	do.....	37FR15655
CIA.....	do.....	do.....	37FR15687
NARS.....	do.....	do.....	37FR15687
Justice Department.....	do.....	do.....	37FR15645
Treasury Department.....	Aug. 21, 1972	Oct. 5, 1972	37FR20990
Civil Service.....	Sept. 7, 1972	Oct. 17, 1972	37FR21925
NASA.....	Aug. 6, 1972	Oct. 26, 1972	37FR22854
Export-Import Bank.....	Aug. 12, 1972	Oct. 27, 1972	37FR22969
Arms Control and Disarmament.....	Oct. 2, 1972	Nov. 1, 1972	37FR23256
EPA.....	Aug. 8, 1972	Nov. 4, 1972	37FR23541
ACTION.....	Oct. 16, 1972	Nov. 10, 1972	37FR23919
Office of Emergency Preparedness.....	Oct. 2, 1972	Nov. 11, 1972	37FR24032
Panama Canal.....	Oct. 3, 1972	Dec. 1, 1972	37FR25504
GSA.....	Sept. 1, 1972	Dec. 5, 1972	37FR25823
FMC.....	Oct. 3, 1972	Dec. 13, 1972	37FR26521
OMB.....	Oct. 17, 1972	Dec. 14, 1972	37FR26575
Civil Aeronautics Board.....	do.....	do.....	37FR26582
Interior Department.....	Nov. 30, 1972	do.....	37FR26594
HEW.....	Oct. 16, 1972	do.....	37FR26596
National Science Foundation.....	Oct. 17, 1972	Dec. 15, 1972	37FR26718
Transportation.....	Nov. 7, 1972	Dec. 22, 1972	37FR28297
FCC.....	Oct. 10, 1972	Jan. 8, 1973	38FR998
Agriculture.....	Nov. 21, 1972	do.....	38FR963
Commerce.....	Dec. 11, 1972	Jan. 12, 1973	38FR1383
Interstate Commerce Commission.....	Nov. 20, 1972	do.....	38FR1393
Labor.....	Oct. 11, 1972	Jan. 26, 1973	38FR2418
Federal Power Commission.....	Jan. 4, 1973	Feb. 26, 1973	38FR5161



Standard Form 86 AUGUST 1964 U.S. CIVIL SERVICE COMMISSION (FPM CHAPTER 736) 44-107		SECURITY INVESTIGATION DATA FOR SENSITIVE POSITION		CASE SERIAL NO. (CSC use only)	
INSTRUCTIONS: Prepare in triplicate, using a typewriter. Fill in all items. If the answer is "No" or "None," so state. If more space is needed for any item, continue under item 28.					
1 FULL NAME <i>(Initials and abridgements of full name are not acceptable. If no middle name, show "(NMN)". If initials only, show "(no given or middle name)".</i>		(LAST NAME) (FIRST NAME) (MIDDLE NAME)		2 DATE OF BIRTH	
OTHER NAMES USED <i>(Maiden name, names by former marriages, former names changed legally or otherwise, aliases, nicknames, etc. Specify which, and show dates used.)</i>		3 PLACE OF BIRTH		4 <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	
		5 HEIGHT		WEIGHT	COLOR EYES
					COLOR HAIR
6 <input type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> WIDOW(ER) <input type="checkbox"/> DIVORCED		7 IF MARRIED, WIDOWED, OR DIVORCED, GIVE FULL NAME AND DATE AND PLACE OF BIRTH OF SPOUSE OR FORMER SPOUSE. INCLUDE WIFE'S MAIDEN NAME. GIVE DATE AND PLACE OF MARRIAGE OR DIVORCE. <i>(Give same information regarding all previous marriages and divorces.)</i>			
8 DATES AND PLACES OF RESIDENCE <i>(If actual places of residence differ from the mailing addresses, furnish and identify both. Begin with present and go back to January 1, 1937. Continue under item 28 on other side if necessary.)</i>					
FROM		TO	NUMBER AND STREET	CITY	STATE
9 <input type="checkbox"/> BY BIRTH <input type="checkbox"/> NATURALIZED ALIEN REGISTRATION NO. DATE, PLACE, AND COURT					
<input type="checkbox"/> U.S. CITIZEN		CERT NO.	PETITION NO.		
<input type="checkbox"/> DERIVED-PARENTS CERT. NO(S)					
<input type="checkbox"/> ALIEN		REGISTRATION NO.	NATIVE COUNTRY	DATE AND PORT OF ENTRY	
10. EDUCATION <i>(All schools above elementary)</i>					
NAME OF SCHOOL		ADDRESS	FROM (Year)	TO (Year)	DEGREES
11 THIS SPACE FOR FBI USE <i>(See also item 29)</i>					
12 SOCIAL SECURITY NUMBER					
13 MILITARY SERVICE <i>(Past or present)</i>					
SERIAL NO. <i>(If none, give grade or rating at separation)</i>		BRANCH OF SERVICE <i>(Army, Navy, Air Force, etc.)</i>		FROM (Yr)	TO (Yr)

26a REFERENCES (Name three persons, not relatives or employers, who are aware of your qualifications and fitness)			
NAME IN FULL	HOME ADDRESS	BUSINESS ADDRESS	YEARS KNOWN
26b CLOSE PERSONAL ASSOCIATES (Name three persons, such as friends, schoolmates or colleagues, who know you well)			
NAME IN FULL	HOME ADDRESS	BUSINESS ADDRESS	YEARS KNOWN
27. TO YOUR KNOWLEDGE, HAVE YOU EVER BEEN THE SUBJECT OF A FULL FIELD OR BACKGROUND PERSONAL INVESTIGATION BY ANY AGENCY OF THE FEDERAL GOVERNMENT? <input type="checkbox"/> YES <input type="checkbox"/> NO. (If your answer is "Yes," show in item 28, (1) the name of the investigating agency (2) the approximate date of investigation, and (3) the level of security clearance granted, if known.)			
28. SPACE FOR CONTINUING ANSWERS TO OTHER QUESTIONS (Show item numbers to which answers apply. Attach a separate sheet if there is not enough space here.)			
29. REPORT OF INFORMATION DEVELOPED (This space reserved for FBI use)			DATE:
<p>Before signing this form check back over it to make sure you have answered all questions fully and correctly.</p> <p><b>CERTIFICATION</b></p> <p>I CERTIFY that the statements made by me on this form are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.</p> <p><b>False statement on this form is punishable by law.</b></p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 40%; text-align: center;">             _____              (DATE)           </div> <div style="width: 55%; text-align: center;">             _____              (SIGNATURE—Sign original and first carbon copy)           </div> </div>			
<b>INFORMATION TO BE FURNISHED BY AGENCY</b>			
<p>INSTRUCTIONS TO AGENCY: See Federal Personnel Manual Chapter 736 and FPM Supplement 296-31, Appendix A, for details on when this form is required and how it is used. If this is a request for investigation before appointment, insert "APPL" in the space for Date of Appointment and show information about the proposed appointment in the other spaces for appointment data. The original and the first carbon copy should be signed by the applicant or appointee. Submit the original and the unsigned carbon copy of the form, Standard Form 87 (Fingerprint Chart), and any investigative information about the person received on voucher forms or otherwise, to the United States Civil Service Commission, Bureau of Personnel Investigations, Washington, D.C., 20415. If this is a request for full field security investigation, submit these forms to the attention of the Division of Reimbursable Investigations; if this is a request for preappointment national agency checks, submit these forms to the attention of the Control Section.</p> <p style="text-align: center;"><b>RETAIN THE CARBON COPY OF STANDARD FORM 86 (SIGNED BY THE APPLICANT OR APPOINTEE) FOR YOUR FILES</b></p>			
DATE OF APPOINTMENT	TYPE OF APPOINTMENT <input type="checkbox"/> EXCEPTED <input type="checkbox"/> COMPETITIVE. (Include indefinite and temporary types of competitive appointments)	CIVIL SERVICE REGULATION NUMBER OR OTHER APPOINTMENT AUTHORITY	TITLE OF POSITION AND GRADE OR SALARY
DEPARTMENT OR AGENCY	DUTY STATION	SEND RESULTS OF PREAPPOINTMENT CHECK TO	
THIS IS A SENSITIVE POSITION _____ (SIGNATURE AND TITLE OF AUTHORIZED AGENCY OFFICIAL)			



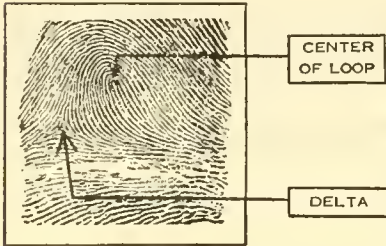
<div>CSC</div>		LEAVE THIS SPACE BLANK			LAST NAME		FIRST NAME		MIDDLE NAME	
SIGNATURE OF PERSON FINGERPRINTED		U. S. CIVIL SERVICE COMMISSION FINGERPRINT CHART					HEIGHT (Inches)			
RESIDENCE ADDRESS		DEPARTMENT, BUREAU, AND DUTY STATION (City and State)					DATE OF BIRTH			
POSITION TO WHICH APPOINTED		SERIAL NUMBER (CSC use only)		PLACE OF BIRTH		LEAVE THIS SPACE BLANK  CLASS. ....  REF. ....				
SIGNATURE OF OFFICIAL TAKING FINGERPRINTS		COLOR OF EYES		COLOR OF HAIR						
TITLE AND ADDRESS		WEIGHT		SEX						
1. RIGHT THUMB		2. RIGHT INDEX		3. RIGHT MIDDLE		4. RIGHT RING		5. RIGHT LITTLE		
6. LEFT THUMB		7. LEFT INDEX		8. LEFT MIDDLE		9. LEFT RING		10. LEFT LITTLE		
LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY				LEFT THUMB	RIGHT THUMB	RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY				

## INSTRUCTIONS

To obtain classifiable fingerprints:

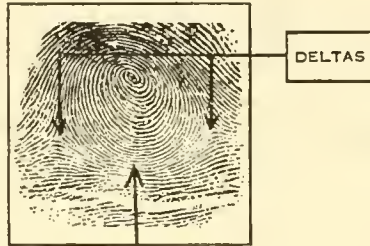
1. Use printer's ink.
2. Distribute ink evenly on inking slab.
3. Wash and dry fingers thoroughly.
4. Roll fingers from nail to nail, and avoid allowing fingers to slip.
5. Be sure impressions are recorded in correct order.
6. If an amputation or deformity makes it impossible to print a finger, make a notation to that effect in the individual finger block.
7. If some physical condition makes it impossible to obtain perfect impressions, submit the best that can be obtained with a memo stapled to the card explaining the circumstances.
8. Examine the completed prints to see if they can be classified, bearing in mind the following:  
Most fingerprints fall into the patterns shown below (other patterns occur infrequently and are not shown here):

## 1. LOOP



THE LINES BETWEEN CENTER OF LOOP AND DELTA MUST SHOW

## 2. WHORL



THESE LINES RUNNING BETWEEN DELTAS MUST BE CLEAR

## 3. ARCH



ARCHES HAVE NO DELTAS

- (a) A delta ( $\Delta$ ) is the point at which the lines forming the loop or whorl pattern spread and begin going in different directions. All loop prints have one delta. Whorl prints have two.
  - (b) Loop prints cannot be classified unless the center of the loop and the delta, and the lines between them, are clear.
  - (c) Whorl prints cannot be classified unless the two deltas and the lines connecting the deltas are clear.
  - (d) Arch fingerprints can be classified if a sufficiently clear impression is obtained to permit identification of the pattern as being an arch.
9. If, upon examination, it appears that any of the impressions cannot be classified, new prints should be made. If not more than three impressions are unclassifiable, new prints of these fingers may be taken and pasted over the defective ones. If more than three are unclassifiable, make a new chart.

THIS SPACE FOR FBI USE



14. HAVE YOU EVER BEEN DISCHARGED FROM THE ARMED FORCES UNDER OTHER THAN HONORABLE CONDITIONS? ☐ YES ☐ NO  
*(If answer is "Yes," give details in item 28.)*

15. EMPLOYMENT. *(List ALL employment dates starting with your present employment. Give both month and year for all dates. Show ALL dates and addresses when unemployed. Give name under which employed if different from name now used.)*

FROM	TO	NAME OF EMPLOYER (Firm or agency) AND SUPERVISOR (Full name, if known)	ADDRESS (Where employed)	TYPE OF WORK	REASON FOR LEAVING
------	----	---	-----------------------------	--------------	--------------------

16. HAVE YOU EVER BEEN DISCHARGED (FIRED) FROM EMPLOYMENT FOR ANY REASON? ☐ YES ☐ NO

17. HAVE YOU EVER RESIGNED (QUIT) AFTER BEING INFORMED THAT YOUR EMPLOYER INTENDED TO DISCHARGE (FIRE) YOU FOR ANY REASON? ☐ YES ☐ NO  
*(If your answer to 16 or 17 above is "Yes," give details in item 28. Show the name and address of employer, approximate date, and reasons in each case. This information should agree with the statements made in item 15—EMPLOYMENT.)*

18. HAVE YOU EVER BEEN ARRESTED, TAKEN INTO CUSTODY, HELD FOR INVESTIGATION OR QUESTIONING, OR CHARGED BY ANY LAW ENFORCEMENT AUTHORITY?  
*(You may omit: (1) Traffic violations for which you paid a fine of \$30 or less, and (2) anything that happened before your 16th birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)* ☐ YES ☐ NO  
IF YOUR ANSWER IS "YES," GIVE FULL DETAILS BELOW:

DATE	CHARGE	PLACE	LAW ENFORCEMENT AUTHORITY	ACTION TAKEN
------	--------	-------	------------------------------	--------------

19 HAVE YOU EVER HAD A NERVOUS BREAKDOWN OR HAVE YOU EVER HAD MEDICAL TREATMENT FOR A MENTAL CONDITION? ☐ YES ☐ NO  
*(If your answer is "Yes," give details in item 28)*

20 FOREIGN COUNTRIES VISITED (SINCE 1930) *(Exclusive of military service)*

COUNTRY

DATE LEFT U.S.A.

DATE RETURNED U.S.A.

PURPOSE

21 ARE YOU NOW, OR HAVE YOU EVER BEEN, A MEMBER OF THE COMMUNIST PARTY, U.S.A., OR ANY COMMUNIST OR FASCIST ORGANIZATION? ☐ YES ☐ NO

22 ARE YOU NOW OR HAVE YOU EVER BEEN A MEMBER OF ANY FOREIGN OR DOMESTIC ORGANIZATION, ASSOCIATION, MOVEMENT, GROUP, OR COMBINATION OF PERSONS WHICH IS TOTALITARIAN, FASCIST, COMMUNIST, OR SUBVERSIVE, OR WHICH HAS ADOPTED, OR SHOWS, A POLICY OF ADVOCATING OR APPROVING THE COMMISSION OF ACTS OF FORCE OR VIOLENCE TO DENY OTHER PERSONS THEIR RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OR WHICH SEEKS TO ALTER THE FORM OF GOVERNMENT OF THE UNITED STATES BY UNCONSTITUTIONAL MEANS? ☐ YES ☐ NO

23 IF YOUR ANSWER TO QUESTION 21 OR 22 ABOVE IS "YES," STATE THE NAMES OF ALL SUCH ORGANIZATIONS, ASSOCIATIONS, MOVEMENTS, GROUPS, OR COMBINATIONS OF PERSONS AND DATES OF MEMBERSHIP IN ITEM 28 OR ON A SEPARATE SHEET TO BE ATTACHED TO AND MADE A PART OF THIS FORM. GIVE COMPLETE DETAILS OF YOUR ACTIVITIES THEREIN AND MAKE ANY EXPLANATION YOU DESIRE REGARDING YOUR MEMBERSHIP OR ACTIVITIES.

NAME IN FULL

ADDRESS

FROM

TO

OFFICE HELD

24 MEMBERSHIP IN OTHER ORGANIZATIONS *(List all organizations in which you are now a member or have been a member, except those which show religious or political affiliations)* *(If none, so state)*

NAME IN FULL

ADDRESS

TYPE

FROM

TO

OFFICE HELD

25 RELATIVES *(Parents, spouse, divorced spouse, children, brothers, and sisters, living or dead. Name of spouse should include maiden name and any other names by previous marriage. If person is dead, state "dead" after relationship and furnish information for other columns as of time of death.)*

RELATION

NAME IN FULL

YEAR OF BIRTH

ADDRESS

COUNTRY OF BIRTH

PRESENT CITIZENSHIP



DEPARTMENT OF STATE SUPPLEMENT TO PERSONAL QUALIFICATIONS STATEMENT (PLEASE TYPE OR PRINT)				DATE	
NAME (First) (Middle) (Maiden, if any) (Last)				DATE OF BIRTH	
<b>INSTRUCTIONS:</b> If you are applying for Civil Service only, answer items 1 thru 3 only. If you are applying for Foreign Service or both Civil Service and Foreign Service, answer all items.					
1. Do you have any relatives, by blood or marriage, now residing in a foreign country? (If "Yes", give name, relationship, and address, in item 10)				YES	NO
2. A. Are you retired from the Military Service? If "Yes", show <input type="checkbox"/> Regular <input type="checkbox"/> Reserve					
B. Have you ever been medically discharged from the armed service? If "Yes", give details in item 10					
3. Have you ever been under treatment for a mental or emotional disorder? If "Yes", give details in item 10					
4. Permanent Address (Place from which you will expect transportation of self and effects if assigned to a Foreign Service post)					
5. Are you a naturalized citizen? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes", give place, date and number of naturalization certificate in item 10					
6. A. If married, give full name of spouse (including maiden name)		Date of Birth		Place of Birth	
B. Citizenship of Spouse <input type="checkbox"/> U.S. <input type="checkbox"/> Other _____		C. If spouse is a naturalized citizen, give place, date and number of naturalization certificate in item 10			
7. Dependents (Name) (Date of Birth) (Relationship) (Will Reside With You Abroad) →				YES	NO
8. A. Are you now involved in any litigation or separation agreement? If "Yes", give details in item 10					
B. Do you know of any prospective litigation in which you may be involved? If "Yes", give details in item 10					
C. Have you been divorced? If "Yes", give court, location, decree and date final decree granted in item 10					
9. Does your present financial position permit discharge of all current debts? If "No", give details in item 10					
10. Space for Detailed Answers to Other Items. Indicate Item Numbers to Which Answers Apply. Attach Extra Sheet, If Needed.					
<b>NOTE: ALL APPLICANTS MUST ANSWER THE FOLLOWING QUESTION:</b>  ARE YOU INVOLVED IN A DISPUTE WITH TAX AUTHORITIES WHICH HAS NOT YET BEEN SETTLED? <input type="checkbox"/> YES <input type="checkbox"/> NO  (IF ANSWER IS "YES" TO THE ABOVE QUESTION, GIVE DETAILS.)					
(Reverse side of this form may be used to list additional experience (see item 18, SF-171, Personal Qualifications Statement)					

## Item 18. EXPERIENCE (Continued from SF-171, Personal Qualifications Statement)

<b>4</b>	Dates of employment (month, year)		Exact title of position	Number and kind of employees you supervise	
	From	To present time			
	Salary or earnings		Classification Grade (If in Federal service)	Place of employment (City & State)	Kind of business or organization, (Manufacturing, accounting, insurance, etc.)
Starting \$	per				
Present \$		per			
Name and address of employer (firm, organization, etc.)			Name, title, and present address of immediate supervisor		
Reason for wanting to leave					
Description of work					
<b>5</b>	Dates of employment (month, year)		Exact title of position	Number and kind of employees you supervised	
	From	To			
	Salary or earnings		Classification Grade (If in Federal service)	Place of employment (City & State)	Kind of business or organization, (Manufacturing, accounting, insurance, etc.)
Starting \$	per				
Final \$		per			
Name and address of employer (firm, organization, etc.)			Name, title, and present address of immediate supervisor		
Reason for leaving					
Description of work					
<b>6</b>	Dates of employment (month, year)		Exact title of position	Number and kind of employees you supervised	
	From	To			
	Salary or earnings		Classification Grade (If in Federal service)	Place of employment (City & State)	Kind of business or organization, (Manufacturing, accounting, insurance, etc.)
Starting \$	per				
Final \$		per			
Name and address of employer (firm, organization, etc.)			Name, title, and present address of immediate supervisor		
Reason for leaving					
Description of work					



FORM OS-944  
6-18-59

## DEPARTMENT OF STATE

## CERTIFICATE OF NONMEMBERSHIP IN CERTAIN ORGANIZATIONS

Listed below are names of foreign or domestic organizations, movements, groups, or combination of persons which, after appropriate investigation and determination are identified and designated by the Department of Justice under Executive Order No. 10450 as Totalitarian, Fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means:

Each applicant must review the following list of organizations for certification purposes, and sign on the last page.

Abraham Lincoln Brigade  
Abraham Lincoln School, Chicago, Illinois  
Action Committee to Free Spain Now  
Alabama People's Educational Association (see Communist Political Association)  
American Association for Reconstruction in Yugoslavia, Inc.  
American Branch of the Federation of Greek Maritime Unions  
American Christian Nationalist Party  
American Committee for European Workers' Relief (see Socialist Workers Party)  
American Committee for Protection of Foreign Born  
American Committee for Spanish Freedom  
American Committee for the Settlement of Jews in Birobidjan, Inc.  
American Committee for Yugoslav Relief, Inc.  
American Committee to Survey Labor Conditions in Europe  
American Council for a Democratic Greece, formerly known as the Greek American Council, Greek American Committee for National Unity  
American Council on Soviet Relations  
American Croatian Congress  
American Jewish Labor Council  
American League Against War and Fascism  
American League for Peace and Democracy  
American National Labor Party  
American National Socialist League  
American National Socialist Party  
American Nationalist Party  
American Patriots, Inc.  
American Peace Crusade  
American Peace Mobilization  
American Poles for Peace  
American Polish Labor Council  
American Polish League  
American Rescue Ship Mission (a project of the United American Spanish Aid Committee)  
American-Russian Fraternal Society  
American Russian Institute, New York, also known as the American Russian Institute for Cultural Relations with the Soviet Union  
American Russian Institute, Philadelphia  
American Russian Institute of San Francisco  
American Russian Institute of Southern California, Los Angeles  
American Slav Congress  
American Women for Peace  
American Youth Congress  
American Youth for Democracy  
Armenian Progressive League of America  
Associated Klans of America  
Association of Georgia Klans  
Association of German Nationals (Reichsdeutsche Vereinigung)  
Ausland-Organisation der NSDAP, Overseas Branch of Nazi Party  
Baltimore Forum  
Benjamin Davis Freedom Committee  
Black Dragon Society  
Boston School for Marxist Studies, Boston, Massachusetts  
Bridges-Robertson-Schmidt Defense Committee  
Bulgarian American People's League of the United States of America  
California Emergency Defense Committee  
California Labor School, Inc., 321 Divisadero Street, San Francisco, California  
Carpatho-Russian People's Society  
Central Council of American Women of Croatian Descent, also known as Central Council of American Croatian Women, National Council of Croatian Women  
Central Japanese Association (Beikoku Chuo Nipponjin Kai)  
Central Japanese Association of Southern California  
Central Organization of the German-American National Alliance (Deutsche-Amerikanische Einheitsfront)  
Cervantes Fraternal Society  
China Welfare Appeal, Inc.  
Chopin Cultural Center  
Citizens Committee for Harry Bridges  
Citizens Committee of the Upper West Side (New York City)  
Citizens Committee to Free Earl Browder  
Citizens Emergency Defense Conference  
Citizens Protective League  
Civil Liberties Sponsorship Committee of Pittsburgh  
Civil Rights Congress and its affiliated organizations, including:  
Civil Rights Congress for Texas  
Veterans Against Discrimination of Civil Rights Congress of New York  
Civil Rights Congress for Texas (see Civil Rights Congress)  
Columbians  
Comite Coordinador Pro Republica Espanola

Comite Pro Derechos Civiles  
(See Puerto Rican Comite Pro Libertades Civiles)  
Committee for a Democratic Far Eastern Policy  
Committee for Constitutional and Political Freedom  
Committee for Nationalist Action  
Committee for Peace and Brotherhood Festival in Philadelphia  
Committee for the Defense of the Pittsburgh Six  
Committee for the Negro in the Arts  
Committee for the Protection of the Bill of Rights  
Committee for World Youth Friendship and Cultural Exchange  
Committee to Abolish Discrimination in Maryland  
(See Congress Against Discrimination, Maryland Congress Against Discrimination; Provisional Committee to Abolish Discrimination in the State of Maryland)  
Committee to Aid the Fighting South  
Committee to Defend Marie Richardson  
Committee to Defend the Rights and Freedom of Pittsburgh's Political Prisoners  
Committee to Uphold the Bill of Rights  
Commonwealth College, Mena, Arkansas  
Communist Party, U. S. A., its subdivisions, subsidiaries and affiliates  
Communist Political Association, its subdivisions, subsidiaries and affiliates, including:  
Alabama People's Educational Association  
Florida Press and Educational League  
Oklahoma League for Political Education  
People's Educational and Press Association of Texas  
Virginia League for People's Education  
Congress Against Discrimination  
(See Committee to Abolish Discrimination in Maryland)  
Congress of American Revolutionary Writers  
Congress of American Women  
Congress of the Unemployed  
Connecticut Committee to Aid Victims of the Smith Act  
Connecticut State Youth Conference  
Council for Jobs, Relief and Housing  
Council for Pan-American Democracy  
Council of Greek Americans  
Council on African Affairs  
Croatian Benevolent Fraternity  
Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan)  
Daily Worker Press Club  
Daniels Defense Committee  
Dante Alighieri Society (between 1935 and 1940)  
Dennis Defense Committee  
Detroit Youth Assembly  
East Bay Peace Committee  
Elsinore Progressive League  
Emergency Conference to Save Spanish Refugees (founding body of the North American Spanish Aid Committee)  
Everybody's Committee to Outlaw War  
Families of the Baltimore Smith Act Victims  
Families of the Smith Act Victims  
Federation of Italian War Veterans in the U. S. A. Inc. (Associazione Nazionale Combattenti Italiani, Federazione degli Stati Uniti d'America)  
Finnish American Mutual Aid Society  
Florida Press and Educational League (see Communist Political Association)  
Frederick Douglass Educational Center  
Freedom Stage, Inc.  
Friends of the New Germany (Freunde des Neuen Deutschlands)  
Friends of the Soviet Union  
Garibaldi American Fraternal Society  
George Washington Carver School, New York City  
German-American Bund (Amerikadeutscher Volksbund)  
German-American Republican League  
German-American Vocational League (Deutsche-Amerikanische Berufsgemeinschaft)  
Guardian Club  
Harlem Trade Union Council  
Hawaii Civil Liberties Committee  
Heimusha Kai, also known as Nokubei Heikei Gimusha Kai, Zaibel Nihonjin, Heiysku Gimusha Kai, and Zaibel Heimusha Kai (Japanese Residing in America Military Conscripts Association)  
Hellenic-American Brotherhood  
Hinode Kai (Imperial Japanese Reservists)  
Hinomaru Kai (Rising Sun Flag Society—a group of Japanese War Veterans)  
Hokubei Zaigo Shoke Dan (North American Reserve Officers Association)

Hollywood Writers Mobilization for Defense  
 Hungarian-American Council for Democracy  
 Hungarian Brotherhood  
 Idaho Pension Union  
 Independent Party (Seattle, Washington)  
 (See Independent People's Party)  
 Independent People's Party  
 (See Independent Party)  
 Industrial Workers of the World  
 International Labor Defense  
 International Workers Order, its subdivisions, subsidiaries and affiliates  
 Japanese Association of America  
 Japanese Overseas Central Society (Kaigai Dobo Chuo Kai)  
 Japanese Overseas Convention, Tokyo, Japan, 1940  
 Japanese Protective Association (Recruiting Organization)  
 Jefferson School of Social Science, New York City  
 Jewish Culture Society  
 Jewish People's Committee  
 Jewish People's Fraternal Order  
 Jikyoku Linkai (The Committee for the Crisis)  
 Johnson-Forest Group  
 (See Johnsonites)  
 Johnsonites  
 (See Johnson-Forest Group)  
 Joint Anti-Fascist Refugee Committee  
 Joint Council of Progressive Italian-Americans, Inc.  
 Joseph Weydemeyer School of Social Science, St. Louis, Missouri  
 Kibei Seinen Kai (Association of U. S. Citizens of Japanese Ancestry who have returned to America after studying in Japan)  
 Knights of the White Camellia  
 Ku Klux Klan  
 Kyffhaeuser, also known as Kyffhaeuser League (Kyffhaeuser Bund)  
 Kyffhaeuser Fellowship (Kyffhaeuser Kameradschaft)  
 Kyffhaeuser War Relief (Kyffhaeuser Kriegshilfswerk)  
 Labor Council for Negro Rights  
 Labor Research Association, Inc.  
 Labor Youth League  
 League for Common Sense  
 League of American Writers  
 Lictor Society (Italian Black Shirts)  
 Macedonian-American People's League  
 Mario Morgantini Circle  
 Maritime Labor Committee to Defend Al Lannon  
 Maryland Congress Against Discrimination  
 (See Committee to Abolish Discrimination in Maryland)  
 Massachusetts Committee for the Bill of Rights  
 Massachusetts Minute Women for Peace (not connected with the Minute Women of the U. S. A., Inc.)  
 Maurice Braverman Defense Committee  
 Michigan Civil Rights Federation  
 Michigan Council for Peace  
 Michigan School of Social Science  
 Nanka Teikoku Gunyudan (Imperial Military Friends Group or Southern California War Veterans)  
 National Association of Mexican Americans (also known as Asociacion Nacional Mexico-Americana)  
 National Blue Star Mothers of America (not to be confused with the Blue Star Mothers of America organized in February 1942)  
 National Committee for Freedom of the Press  
 National Committee for the Defense of Political Prisoners  
 National Committee to Win Amnesty for Smith Act Victims  
 National Committee to Win the Peace  
 National Conference on American Policy in China and the Far East (a Conference called by the Committee for a Democratic Far Eastern Policy)  
 National Council of Americans of Croatian Descent  
 National Council of American-Soviet Friendship  
 National Federation for Constitutional Liberties  
 National Labor Conference for Peace  
 National Negro Congress  
 National Negro Labor Council  
 Nationalist Action League  
 Nationalist Party of Puerto Rico  
 Nature Friends of America (since 1935)  
 Negro Labor Victory Committee  
 New Committee for Publications  
 Nichibei Kogyo Kaisha (The Great Fujii Theatre)  
 North American Committee to Aid Spanish Democracy  
 North American Spanish Aid Committee  
 North Philadelphia Forum  
 Northwest Japanese Association  
 Ohio School of Social Sciences  
 Oklahoma Committee to Defend Political Prisoners  
 Oklahoma League for Political Education (see Communist Political Association)  
 Original Southern Klans, Incorporated  
 Pacific Northwest Labor School, Seattle, Washington  
 Palo Alto Peace Club  
 Partido del Pueblo of Panama (operating in the Canal Zone)  
 Peace Information Center  
 Peace Movement of Ethiopia

People's Drama, Inc.  
 People's Educational and Press Association of Texas (see Communist Political Association)  
 People's Educational Association (incorporated under name Los Angeles Educational Association, Inc.), also known as People's Educational Center, People's University, People's School  
 People's Institute of Applied Religion  
 Peoples Programs (Seattle, Washington)  
 People's Radio Foundation, Inc.  
 People's Rights Party  
 Philadelphia Labor Committee for Negro Rights  
 Philadelphia School of Social Science and Art  
 Photo League (New York City)  
 Pittsburgh Arts Club  
 Political Prisoners' Welfare Committee  
 Polonia Society of the IWO  
 Progressive German-Americans, also known as Progressive German-Americans of Chicago  
 Proletarian Party of America  
 Protestant War Veterans of the United States, Inc.  
 Provisional Committee of Citizens for Peace, Southwest Area  
 Provisional Committee on Latin American Affairs  
 Provisional Committee to Abolish Discrimination in the State of Maryland  
 (See Committee to Abolish Discrimination in Maryland)  
 Puerto Rican Comité Pro Liberados Civiles (CLC)  
 (See Comité Pro Derechos Civiles)  
 Puertorriqueños Unidos (Puerto Ricans United)  
 Quad City Committee for Peace  
 Queensbridge Tenants League  
 Revolutionary Workers League  
 Romanian-American Fraternal Society  
 Russian American Society, Inc.  
 Sakura Kai (Patriotic Society, or Cherry Association—composed of veterans of Russo-Japanese War)  
 Samuel Adams School, Boston, Massachusetts  
 Santa Barbara Peace Forum  
 Schappes Defense Committee  
 Schneideman-Darcy Defense Committee  
 School of Jewish Studies, New York City  
 Seattle Labor School, Seattle, Washington  
 Serbian-American Fraternal Society  
 Serbian Vidovdan Council  
 Shinto Temples (limited to State Shinto abolished in 1945)  
 Silver Shirt Legion of America  
 Slavic Council of Southern California  
 Slovak Workers Society  
 Slovenian-American National Council  
 Socialist Workers Party, including American Committee for European Workers' Relief  
 Sokoku Kai (Fatherland Society)  
 Southern Negro Youth Congress  
 Suiko Sha (Reserve Officers Association, Los Angeles)  
 Syracuse Women for Peace  
 Tom Paine School of Social Science, Philadelphia, Pennsylvania  
 Tom Paine School of Westchester, New York  
 Trade Union Committee for Peace  
 (See Trade Unionists for Peace)  
 Trade Unionists for Peace  
 (See Trade Union Committee for Peace)  
 Tri-State Negro Trade Union Council  
 Ukrainian-American Fraternal Union  
 Union of American Croats  
 Union of New York Veterans  
 United American Spanish Aid Committee  
 United Committee of Jewish Societies and Landsmanschaft Federations, also known as Coordination Committee of Jewish Landsmanschaften and Fraternal Organizations  
 United Committee of South Slavic Americans  
 United Defense Council of Southern California  
 United Harlem Tenants and Consumers Organization  
 United May Day Committee  
 United Negro and Allied Veterans of America  
 Veterans Against Discrimination of Civil Rights Congress of New York (see Civil Rights Congress)  
 Veterans of the Abraham Lincoln Brigade  
 Virginia League for People's Education (see Communist Political Association)  
 Voice of Freedom Committee  
 Walt Whitman School of Social Science, Newark, New Jersey  
 Washington Bookshop Association  
 Washington Committee for Democratic Action  
 Washington Committee to Defend the Bill of Rights  
 Washington Commonwealth Federation  
 Washington Pension Union  
 Wisconsin Conference on Social Legislation  
 Workers Alliance (since April 1936)  
 Yiddisher Kultur Farband  
 Young Communist League  
 Yugoslav-American Cooperative Home, Inc.  
 Yugoslav Seamen's Club, Inc.



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<p>I certify that I have read the names of the above-listed organizations, and that I am not now, nor have I ever been, a member of, in association with, or affiliated with, or that I have not contributed to any of such organizations, except as indicated and explained below:</p>			
ORGANIZATION		DATES OF MEMBERSHIP	
REMARKS:			
SIGNED AT (City and State)		DATE	SIGNATURE

DEPARTMENT OF STATE				
REQUEST FOR BIOGRAPHIC DATA				
INSTRUCTIONS: - FOR PRIVATE PERSON FILLING OUT THIS FORM				
1. All copies of this form must be legible; please use <u>typewriter only</u> in filling it out.				
2. After you have filled out form, please do not remove the carbons.				
FULL NAME (Married women include maiden name)		ALIASES, NICKNAMES		DATE AND PLACE OF BIRTH
HOME ADDRESS		SEX	CITIZENSHIP	MARITAL STATUS SPOUSE'S NAME
OCCUPATION	NAME AND ADDRESS OF PRESENT EMPLOYER			
PREVIOUS EMPLOYERS AND FORMER ADDRESSES (Approximately last ten years)				
FOR USE OF DEPARTMENT OF STATE ONLY				
OFFICE		TYPE OF DEPARTMENT PROGRAM		
DATE				
NAME OF SUBMITTING OFFICER				
FOR USE OF OTHER OFFICE(S) OF THE DEPARTMENT OF STATE				

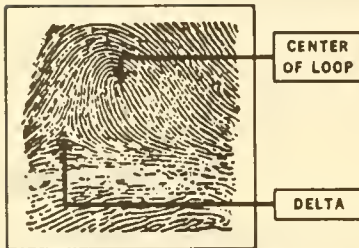


ATTACHMENT C

**FEDERAL BUREAU OF INVESTIGATION  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20537**

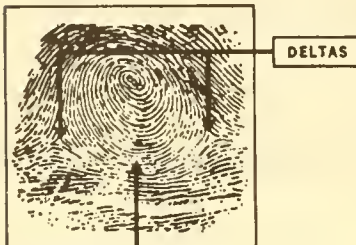
## APPLICANT

### 1. LOOP



THE LINES BETWEEN CENTER OF LOOP AND DELTA MUST SHOW

### 2. WHORL



THESE LINES RUNNING BETWEEN DELTAS MUST BE CLEAR

### 3. ARCH



ARCHES HAVE NO DELTAS

#### TO OBTAIN CLASSIFIABLE FINGERPRINTS:

1. USE PRINTER'S INK.
2. DISTRIBUTE INK EVENLY ON INKING SLAB.
3. WASH AND DRY FINGERS THOROUGHLY.
4. ROLL FINGERS FROM NAIL TO NAIL, AND AVOID ALLOWING FINGERS TO SLIP.
5. BE SURE IMPRESSIONS ARE RECORDED IN CORRECT ORDER.
6. IF AN AMPUTATION OR DEFORMITY MAKES IT IMPOSSIBLE TO PRINT A FINGER, MAKE A NOTATION TO THAT EFFECT IN THE INDIVIDUAL FINGER BLOCK.
7. IF SOME PHYSICAL CONDITION MAKES IT IMPOSSIBLE TO OBTAIN PERFECT IMPRESSIONS, SUBMIT THE BEST THAT CAN BE OBTAINED WITH A MEMO STAPLED TO THE CARD EXPLAINING THE CIRCUMSTANCES.
8. EXAMINE THE COMPLETED PRINTS TO SEE IF THEY CAN BE CLASSIFIED, BEARING IN MIND THAT MOST FINGERPRINTS FALL INTO THE PATTERNS SHOWN ON THIS CARD (OTHER PATTERNS OCCUR INFREQUENTLY AND ARE NOT SHOWN HERE).

#### THIS CARD FOR USE BY:

LEAVE THIS SPACE BLANK

1. LAW ENFORCEMENT AGENCIES IN FINGERPRINTING APPLICANTS FOR LAW ENFORCEMENT POSITIONS, AND APPLICANTS FOR EMPLOYMENT LICENSES OR PERMITS IN THOSE STATES WITH STATUTES PROVIDING FOR FINGERPRINTING AS A REQUISITE FOR THE TYPE OF EMPLOYMENT, LICENSE OR PERMIT TO BE ISSUED. LOCAL AND COUNTY ORDINANCES, UNLESS SPECIFICALLY BASED ON APPLICABLE STATE STATUTES, DO NOT SATISFY THIS REQUIREMENT. A SET OF APPLICANT PRINTS MUST FIRST BE CHECKED THROUGH THE APPROPRIATE STATE IDENTIFICATION BUREAU OR, IF NO SUCH BUREAU EXISTS, THROUGH A CENTRAL AGENCY DESIGNATED FOR SUCH PURPOSE WITHIN THE STATE. ONLY THOSE FINGERPRINTS FOR WHICH NO DISQUALIFYING RECORD HAS BEEN FOUND LOCALLY SHOULD BE SUBMITTED FOR FBI SEARCH. IF A MORE CURRENT COPY OF AN EXISTING FBI IDENTIFICATION RECORD IS REQUIRED, SIMPLY SUPPLY NAME, FBI NUMBER OR LOCAL ARREST NUMBER AND, IF READILY AVAILABLE, THE PRIMARY AND SECONDARY PARTS OF THE FINGERPRINT CLASSIFICATION.

2. U.S. GOVERNMENT AGENCIES IN CONNECTION WITH CLEARANCES. IDENTITY OF PRIVATE CONTRACTOR SHOULD BE SHOWN IN SPACE "EMPLOYER AND ADDRESS." THE CONTRIBUTOR IS THE NAME OF AGENCY SUBMITTING THE FINGERPRINT CARD TO THE FBI.

FBI NUMBER, IF KNOWN, SHOULD ALWAYS BE FURNISHED IN APPROPRIATE SPACE.

MISCELLANEOUS NO. - RECORD; OTHER ARMED FORCES NO., PASSPORT NO. (PP), ALIEN REGISTRATION NO. (AR), PORT SECURITY CARD NO. (PS), SELECTIVE SERVICE NO. (SS), VETERANS' ADMINISTRATION CLAIM NO. (VA).



Form AEC-1  
(8-65)  
Exception to Standard Form 86 approved  
by Bureau of Budget, 5-65  
AECM 2301

UNITED STATES  
ATOMIC ENERGY COMMISSION  
WASHINGTON, D. C. 20545

PERSONNEL SECURITY QUESTIONNAIRE

INSTRUCTIONS—All sections must be completed. Write "None" when applicable. Type or print all answers. If space is not adequate for complete answers, use the additional space provided under Item No. 27. All addresses must show street number, street, city, and State.

1. NAME (Last, first, middle)		S. DESCRIPTION			
		MALE OR FEMALE	HEIGHT	WEIGHT	COLOR EYES COLOR HAIR
2. ALL OTHER NAMES (Include maiden name, names by former marriages, and dates that names were used)		6 (Check which) <input type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> WIDOW (ER) <input type="checkbox"/> DIVORCED (DATE & PLACE OF DIVORCE)			
3. PRESENT RESIDENCE (Street and Number, City and State)		7. BIRTH MONTH DAY YEAR DATE			
4. ALL OTHER RESIDENCES FOR PAST 15 YEARS DATES		B. BIRTHPLACE (City, county, State, and country)			
		9. CITIZENSHIP: U. S. <input type="checkbox"/> ALIEN <input type="checkbox"/>			
		A. IF U. S. CITIZEN, INDICATE WHETHER:			
		(1) BY BIRTH <input type="checkbox"/> (3) BY NATURALIZATION <input type="checkbox"/>			
		(2) DERIVATIVE <input type="checkbox"/> ALIEN REGISTRATION NO.			
		DATE PETITION NO.			
		CERTIFICATE NO. DATE CERTIFICATE NO.			
		PLACE PLACE			
		B. IF ALIEN, INDICATE:			
		(1) ALIEN REGISTRATION NO. (2) PRESENT CITIZENSHIP			
		(3) DATE OF ENTRY (4) PORT OF ENTRY			
		10. DRAFT BOARD NUMBER AND ADDRESS 11. SOCIAL SECURITY NO.			
		12. MILITARY SERVICE (Past or present)			
		SERIAL NOS. BRANCH FROM (Yr.) TO (Yr.)			

13. EDUCATION (All schools above elementary)	
NAME OF SCHOOL	ADDRESS
	FROM (Yr.) TO (Yr.) DEGREES

14. FOREIGN COUNTRIES VISITED (Since 1930) (Exclusive of military service)		
COUNTRY	DATE LEFT U. S. A.	DATE RETURNED U. S. A.
		PURPOSE

15. EMPLOYMENT (List ALL employment dates including present employment and ALL dates and addresses when unemployed. If any employments required AEC security clearance or access authorization, indicate this fact after the name of the company or organization which requested the clearance. Give name or names under which employed if different than name now used.)

DATE FROM-TO	NAME OF EMPLOYER (COMPANY OR ORGANIZATION)	TYPE OF WORK	ADDRESS (Where employed)	REASON FOR LEAVING
--------------	--	--------------	--------------------------	--------------------

FOLO  
HERE

FOLO  
HERE

10 ORGANIZATION MEMBERSHIP (Include all present membership and all past membership during the last 15 years in all organizations, except labor unions and religious organizations not covered by Question 17 below.)

NAME	ADDRESS	TYPE	FROM—	TO—	OFFICE HELD
------	---------	------	-------	-----	-------------

17. ARE YOU NOW, OR HAVE YOU EVER BEEN, A MEMBER OF ANY ORGANIZATION WHICH HAS BEEN DESIGNATED BY THE UNITED STATES ATTORNEY GENERAL AS REQUIRED UNDER THE PROVISIONS OF EXECUTIVE ORDER 10450? (For your convenience, there is attached to this questionnaire as Appendix A, the current list of such organizations. Appendix A is hereby made an integral part of this Personnel Security Questionnaire.)

Answer "Yes" or "No"

18. ARE YOU NOW OR HAVE YOU EVER BEEN A MEMBER OF THE COMMUNIST PARTY, U.S.A., OR ANY COMMUNIST ORGANIZATION?

Answer "Yes" or "No"

19. ARE YOU NOW OR HAVE YOU EVER BEEN A MEMBER OF A FASCIST ORGANIZATION?

Answer "Yes" or "No"

20. ARE YOU NOW OR HAVE YOU EVER BEEN A MEMBER OF ANY FOREIGN OR DOMESTIC ORGANIZATION, ASSOCIATION, MOVEMENT, GROUP, OR COMBINATION OF PERSONS WHICH IS TOTALITARIAN, FASCIST, COMMUNIST, OR SUBVERSIVE, OR WHICH HAS ADOPTED, OR SHOWS, A POLICY OF ADVOCATING OR APPROVING THE COMMISSION OF ACTS OF FORCE OR VIOLENCE TO DENY OTHER PERSONS THEIR RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES, OR WHICH SEEKS TO ALTER THE FORM OF GOVERNMENT OF THE UNITED STATES BY UNCONSTITUTIONAL MEANS?

Answer "Yes" or "No"

21. IF YOUR ANSWER TO QUESTION 17, 18, 19, OR 20 ABOVE IS "YES," STATE BELOW, UNDER ITEM NO. 27, OR ON A SEPARATE SHEET TO BE FURNISHED WITH THIS QUESTIONNAIRE, THE NAMES AND DATES OF MEMBERSHIP, GIVE COMPLETE DETAILS OF YOUR ACTIVITIES THEREIN, AND MAKE ANY EXPLANATION YOU DESIRE REGARDING YOUR MEMBERSHIP OR ACTIVITIES.

Answer "Yes" or "No"

22. RELATIVES (Parents, stepparents, foster parents, spouse, divorced spouse or spouses, children, stepchildren, brothers, sisters, stepbrothers, sisters, halfbrothers, halfsisters, father-in-law, and mother-in-law, living or dead. Name of spouse should include maiden name and any other names by previous marriage. If spouse is an alien or if you marry subsequent to the execution of this questionnaire, it will be necessary that data concerning your spouse be furnished on Form AEC-354.)

RELATION	NAME IN FULL	AGE	ADDRESS	FROM—	TO—	OFFICE HELD
----------	--------------	-----	---------	-------	-----	-------------

23. REFERENCES (Name three persons, not relatives or employers, who are well acquainted with you)

NAME IN FULL	BUSINESS AND HOME ADDRESS	YEARS KNOWN
--------------	---------------------------	-------------

24. HAVE YOU EVER BEEN ARRESTED, CHARGED, OR HELD BY FEDERAL, STATE, OR OTHER LAW-ENFORCEMENT AUTHORITIES FOR ANY VIOLATION OF ANY FEDERAL LAW, STATE LAW, COUNTY OR MUNICIPAL LAW, REGULATION, OR ORDINANCE? DO NOT INCLUDE ANYTHING THAT HAPPENED BEFORE YOUR 16TH BIRTHDAY. DO NOT INCLUDE TRAFFIC VIOLATIONS FOR WHICH A FINE OF \$25 OR LESS WAS IMPOSED. ALL OTHER CHARGES MUST BE INCLUDED EVEN IF THEY WERE DISMISSED.

If your answer is, "Yes," give in item 25 for each case:  
(A) approximate date, (B) charge, (C) place, (D) action taken

Answer "Yes" or "No"

25. ARRESTS (Include all arrests and fines other than minor traffic violations)

A. DATE	B. CHARGE	C. PLACE WHERE ARRESTED AND NAME OF LAW ENFORCEMENT AUTHORITY	D. ACTION TAKEN
---------	-----------	---	-----------------

26. PREVIOUS SECURITY CLEARANCE OR ACCESS AUTHORIZATION:

A. TO YOUR KNOWLEDGE HAVE YOU EVER BEEN INVESTIGATED BY ANY BRANCH OF THE FEDERAL GOVERNMENT?

Answer "Yes" or "No"

B. TO YOUR KNOWLEDGE HAVE YOU EVER BEEN REFUSED CLEARANCE OR ACCESS AUTHORIZATION BY ANY BRANCH OF THE FEDERAL GOVERNMENT?

If your answer to either question A. or B. is "Yes," please furnish details:

CERTIFICATION

I HAVE READ ALL OF THE ABOVE QUESTIONS AND REVIEWED THE LIST OF ORGANIZATIONS SET FORTH IN APPENDIX A HEREOF. I CERTIFY THAT THE INFORMATION FURNISHED IN ANSWER TO THESE QUESTIONS IS CORRECT AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF AND I UNDERSTAND THAT IT IS OF GREAT IMPORTANCE IN THE CONSIDERATION OF THE SECURITY OF THE UNITED STATES AND THAT IT WILL BE USED BY THE COMMISSION IN CARRYING OUT ITS DUTY TO PROTECT THE SECURITY OF THE ATOMIC ENERGY PROJECT, AND WITH KNOWLEDGE THAT ANY FALSE STATEMENT OR OMISSION OF MATERIAL FACT MAY BE SUFFICIENT CAUSE FOR REJECTION OF MY APPLICATION OR DISMISSAL AFTER EMPLOYMENT; FURTHER, THAT ANY FALSE STATEMENT HEREIN MAY BE PUNISHED AS A FELONY UNDER SECTION 1001, TITLE 18, U. S. CODE.

(USUAL SIGNATURE OF PERSON FILLING OUT QUESTIONNAIRE) (Sign original only) (DATE AND PLACE WHERE SIGNED)

BRIEF DESCRIPTION OF DUTIES (Description should not reveal classified information)

TO BE FILLED OUT BY AGENCY OR FIRM EMPLOYING

NAME OF AGENCY OR FIRM

ADDRESS

WILL PERSON HAVE ACCESS TO:  
RESTRICTED DATA ☐ YES ☐ NO  
EXCLUSION AREA ☐ YES ☐ NO

(SIGNATURE AND TITLE OF OFFICIAL REQUESTING CLEARANCE OR ACCESS AUTHORIZATION)

FOLD HERE

FOLD HERE



(PLEASE REMOVE AND REVERSE CARBON PAPER BEFORE USING THIS SPACE)

27. ADDITIONAL SPACE FOR FURNISHING INFORMATION REQUESTED IN ITEMS 1 TO 26. (Indicate item numbers to which answers apply).

ITEM NO.

APPENDIX A

Set forth below is a list of the organizations designated by the Attorney General pursuant to Executive Order No. 10450, as Totalitarian, Fascist, Communist, or Subversive, or as having adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States, or which seek to alter the form of Government of the United States by unconstitutional means.

[The list of designated organizations is identical to that attached to the State Department form in Attachment B and is therefore here.]





UNITED STATES  
ATOMIC ENERGY COMMISSION

## SECURITY ACKNOWLEDGMENT

I, \_\_\_\_\_, in anticipation of my security clearance by the United States Atomic Energy Commission, make the following statement with the understanding and intent that my statement will be used by the AEC in carrying out its obligation to protect the security of Restricted Data and other classified information.

1. I understand that it is the policy of the AEC to control the dissemination of Restricted Data and other classified information in such a manner as to assure the common defense and security.
2. I understand that, in carrying out the aforesaid policy, the AEC has issued and will issue and revise, as circumstances require, certain instructions and regulations pertaining to the control and dissemination of Restricted Data and other classified information.
3. I shall not reveal to any person any Restricted Data or other classified information, of which I gain knowledge as a result of my employment, assignment, or duties, except in accordance with official instructions and regulations of the AEC or except as may be hereafter authorized by officials empowered to grant such authority.
4. I understand that the provisions of the Atomic Energy Act of 1954 prescribe penalties for the disclosure of Restricted Data to unauthorized persons, and the provisions of U.S. Code, Title 18, "Crimes and Criminal Procedures," prescribe penalties for the disclosure to unauthorized persons of information respecting the national defense, and for loss, destruction or compromise of such information through gross negligence.
5. I understand that willful or gross carelessness in revealing or disclosing to any unauthorized person Restricted Data or other classified matter pertaining to the AEC or any other Government agency may constitute sufficient cause for termination of my association with the atomic energy program.
6. I understand that the Atomic Energy Commission desires to be informed when persons granted AEC security clearance propose to travel to Soviet-bloc countries.

(Normally, an individual will not be asked to forego any travel unless the travel is of such nature as to be considered unwise from the standpoint of personal safety or there are special circumstances existing which would make such travel unwise from the standpoint of the security of the atomic energy program. The AEC's security interest in such travel normally diminishes as the period of access to Restricted Data or other classified information becomes more remote. Personnel cleared by the AEC but employed by other government agencies are not required to inform the AEC of official foreign travel.)

7. I understand that I am to notify the AEC as soon as is practicable of all arrests, charges (including charges that are dismissed), or detentions by Federal, State or other law enforcement authorities, for any violation of any Federal law, State law, county or municipal law, regulation or ordinance, other than traffic violations for which a fine of \$25 or less was imposed, occurring during any period in which I may hold AEC clearance and which occurred subsequent to the completion of the Personnel Security Questionnaire which I executed on \_\_\_\_\_.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Place at which Security Acknowledgment is signed)

\_\_\_\_\_  
(Name of employer)

## ATTACHMENT D

## DEFENSE DEPARTMENT DIRECTIVE AND FORMS USED FOR SECURITY CLEARANCES

CH 7  
DoD 5200.1-R

## ACCESS, DISSEMINATION AND ACCOUNTABILITY

#### 7-104 Administrative Withdrawal of Security Clearance

Each component and the DSA for the Industrial Security Program, shall make provision for administratively withdrawing the security clearance of any persons for whom there is no foreseeable need for access to classified information or material in connection with the performance of their official duties or contractual obligations of contractors. Likewise, when a person no longer needs access to a particular security classification category, the security clearance shall be adjusted to the classification category still required for the performance of his duties and obligations. In both instances, such action will be without prejudice to the person's eligibility for a future security clearance.

#### 7-105 Revocation of Security Clearance for Cause

Security clearances may be revoked for cause when it is determined in consonance with due process of law that any person holding such clearance is no longer reliable or trustworthy.

#### 7-106 Access by Persons Outside the Executive Branch

Classified information may be made available to persons or agencies outside the Executive Branch provided that such classified information is necessary for their performance of a function from which the Government will derive a benefit or advantage, and that such release is not prohibited by the originating department or agency. Heads of DoD components shall designate appropriate officials who shall determine, prior to the release of classified information under this provision, the propriety of such action in the interest of national security and assurance of the recipient's trustworthiness and need-to-know.

- a. *Congress.* Access to classified information or material by Congress, its committees, members, and staff representatives shall be in accordance with DoD Directive 5400.4 (reference (i)). Additionally, any DoD

individual testifying before a Congressional committee in executive session in relation to a classified matter, shall obtain the assurance of committee representatives that everyone present has a security clearance commensurate with the highest classification of the information that may possibly come up for discussion. Members of Congress, by virtue of their elected positions, are not investigated or cleared by the Department of Defense.

- b. *Government Printing Office (GPO).* In order to utilize efficiently the most appropriate Government facilities for large scale reproduction of DoD printed materials, material of all classifications may be processed by the GPO, which protects the information in accordance with Department of Defense-Government Printing Office Agreement, dated June 26, 1956.
- c. *Representatives of the General Accounting Office (GAO).* Representatives of the GAO may be granted access to classified information originated by and in possession of the DoD when such information is relevant to the performance of the statutory responsibilities of that office, as set forth in DoD Directive 7650.1 (reference (j)). Officials of the GAO, as designated in Appendix C, are authorized to certify security clearances, and the bases therefor. (The GAO has adopted DoD standards for granting personnel security clearances.) Certifications will be made by these officials pursuant to arrangements with the DoD component concerned. Personal recognition or presentation of the official credential cards issued by the GAO to its personnel are acceptance for identification purposes.





November 13, 1961  
NUMBER 5148.5

ATSD (LA)

## Department of Defense Directive

SUBJECT Assistant to the Secretary of Defense (Legislative Affairs)

Reference: (a) DOD Directive 5105.13, "Responsibilities of the Assistant to the Secretary of Defense (Legislative Affairs)", August 10, 1957 (hereby cancelled)

### I. GENERAL

Pursuant to the authority vested in the Secretary of Defense under the provisions of the National Security Act of 1947, as amended, the Office of the Assistant to the Secretary of Defense (Legislative Affairs) is hereby established with responsibilities, functions, relationships and authority prescribed below.

### II. RESPONSIBILITY

The Assistant to the Secretary of Defense (Legislative Affairs) is the principal staff assistant to the Secretary of Defense for Department of Defense relations with the Congress.

### III. FUNCTIONS

Under the direction, authority and control of the Secretary of Defense, the Assistant to the Secretary of Defense (Legislative Affairs) shall perform the following functions:

- A. Advise and assist the Secretary of Defense and other officials of the Department of Defense on Congressional aspects of Department of Defense policies, plans, and programs.

- B. Coordinate Department of Defense actions relating to Congressional consideration of the legislative program of the Department of Defense.
- C. Coordinate the development, clearance, and furnishing of information in response to requests received in the Office of the Secretary of Defense from Members of Congress and the Committees of Congress and their staffs.
- D. Arrange for the designation and appearance of witnesses from the Office of the Secretary of Defense and the Military Departments, as appropriate, at Congressional hearings on Defense matters.
- E. Maintain direct liaison with the Congress, the Executive Office of the President, and other Government agencies with regard to legislative investigations and other pertinent matters affecting the relations of the Department of Defense with the Congress.
- F. Coordinate arrangements for DOD-supported travel for members of the Congress and Congressional staffs.
- G. Provide for Department of Defense processing of personal security clearances of members of Congressional staffs.

#### IV. RELATIONSHIPS

In the performance of his functions, the Assistant to the Secretary of Defense (Legislative Affairs) shall maintain active liaison, as appropriate, with Military Departments and other Department of Defense offices and agencies.

#### V. AUTHORITY

The Assistant to the Secretary of Defense (Legislative Affairs), in the course of exercising full staff functions, is hereby specifically delegated authority to:



Nov 13, 61  
5148.5

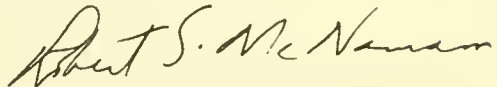
- A. Issue instructions and one-time directive-type memoranda, in writing, appropriate to carrying out policies approved by the Secretary of Defense within his assigned fields of responsibility. Instructions to the Military Departments will be issued through the Secretaries of those departments or their designees
- B. Obtain such reports, information and assistance from the Military Departments and other Department of Defense offices and agencies as may be necessary to the performance of his assigned functions.
- C. Assign responsibility within the Office of the Secretary of Defense to: a. Provide replies to Congressional inquiries; and b. Provide for witnesses and information for Congressional hearings and investigations.
- D. Coordinate Department of Defense participation in Congressional hearings and investigations where two or more military departments are involved.

VI. CANCELLATION

Reference (a) is hereby superseded and cancelled.

VII. EFFECTIVE DATE

This Directive is effective upon publication.



Secretary of Defense

STATEMENT OF PERSONAL HISTORY											
<b>INSTRUCTIONS:</b> Read the certification at the end of this questionnaire before entering the required data. Print or type all answers. All questions and statements must be completed. If the answer is "None," so state. Do not misstate or omit material fact since the statements made herein are subject to verification. If more space is needed, use the Remarks section, item 20, and attach additional sheets if necessary. The information entered hereon is for official use only and will be maintained in confidence.											
1. (Print) FIRST NAME--MIDDLE NAME MAIDEN NAME (If any)--LAST NAME <input type="checkbox"/> MR <input type="checkbox"/> MRS <input type="checkbox"/> MISS						2. STATUS <div style="display: flex; justify-content: space-between;"> <span>CIVILIAN</span> <span>MILITARY ON ACTIVE DUTY</span> </div>					
3 ALIAS(ES) NICKNAME(S), OR CHANGES IN NAME (Other than by marriage)					4 PERMANENT MAILING ADDRESS						
5 DATE OF BIRTH (Day, month, year)			PLACE OF BIRTH (City, County, State, and Country)			PLACE CERTIFICATE RECORDED					
HEIGHT		WEIGHT		COLOR OF EYES		COLOR OF HAIR		SCARS, PHYSICAL DEFECTS, DISTINGUISHING MARKS			
6 DO YOU HAVE A HISTORY OF MENTAL OR NERVOUS DISORDERS? <input type="checkbox"/> YES <input type="checkbox"/> NO ARE YOU NOW OR HAVE YOU EVER BEEN ADDICTED TO THE USE OF HABIT FORMING DRUGS SUCH AS NARCOTICS OR BARBITURATES? <input type="checkbox"/> YES <input type="checkbox"/> NO ARE YOU NOW OR HAVE YOU EVER BEEN A CHRONIC USER TO EXCESS OF ALCOHOLIC BEVERAGES? <input type="checkbox"/> YES <input type="checkbox"/> NO IF THE ANSWER TO ANY OF THE ABOVE IS YES EXPLAIN IN ITEM 20											
7. U. S. CITIZEN <input type="checkbox"/>		NATIVE <input type="checkbox"/> YES <input type="checkbox"/> NO		IF NATURALIZED, CERTIFICATE NO.			IF DERIVED, PARENTS' CERTIFICATE NO(S)		DATE, PLACE, AND COURT		
ALIEN <input type="checkbox"/>		REGISTRATION NO.		NATIVE COUNTRY		DATE AND PORT OF ENTRY			DO YOU INTEND TO BECOME A U. S. CITIZEN? <input type="checkbox"/> YES <input type="checkbox"/> NO		
<b>8. MILITARY SERVICE</b>											
ARE YOU PRESENTLY ON ACTIVE DUTY IN THE U. S. ARMED FORCES DRAWING FULL PAY? <input type="checkbox"/> YES <input type="checkbox"/> NO IF "YES," COMPLETE THE FOLLOWING											
GRADE AND SERVICE NO.			SERVICE AND COMPONENT			ORGANIZATION AND STATION			DATE CURRENT ACTIVE SERVICE STARTED		
ARE YOU PRESENTLY A MEMBER OF A U. S. RESERVE OR NATIONAL GUARD ORGANIZATION? <input type="checkbox"/> YES <input type="checkbox"/> NO IF "YES," COMPLETE THE FOLLOWING											
GRADE AND SERVICE NO.			SERVICE AND COMPONENT			ORGANIZATION AND STATION OR UNIT AND LOCATION					
HAVE YOU PREVIOUSLY SERVED TOURS OF EXTENDED ACTIVE DUTY DRAWING FULL PAY FROM WHICH YOU WERE DISCHARGED OR SEPARATED TO CIVILIAN STATUS? <input type="checkbox"/> YES <input type="checkbox"/> NO IF "YES," COMPLETE THE FOLLOWING											
COUNTRY		SERVICE		COMPONENT		FROM (Date)		TO (Date)		TYPE DISCHARGES OR SEPARATIONS--GRADE AND SERVICE NO.	
<b>9. EDUCATION (Account for all civilian schools and military academies. Do not include service schools)</b>											
MONTH AND YEAR			NAME AND LOCATION OF SCHOOL					GRADUATE		DEGREE	
FROM--		TO--						YES		NO	
<b>10. FAMILY (List in order given, parents, spouse, guardians, stepparents, foster parents, parents-in-law, former spouse(s) (if divorced give date and place), children, brothers and sisters, even though deceased. Include any others you resided with or with whom a close relationship existed or exists. If the person is not a U. S. citizen by birth, give date and port of entry, alien registration number, naturalization certificate number and place of issuance.)</b>											
RELATION AND NAME			DATE AND PLACE OF BIRTH			PRESENT ADDRESS, IF LIVING			U. S. CITIZEN		
									YES		NO
FATHER											
MOTHER (Maiden name)											
SPOUSE (Maiden name)											
OTHER (Specify)											



[illegible]

[illegible]



19 ARE THERE ANY INCIDENTS IN YOUR LIFE NOT MENTIONED HEREIN WHICH MAY REFLECT UPON YOUR LOYALTY TO THE UNITED STATES OR UPON YOUR SUITABILITY TO PERFORM THE DUTIES WHICH YOU MAY BE CALLED UPON TO TAXE OR WHICH MIGHT REQUIRE FURTHER EXPLANATION? <input type="checkbox"/> YES <input type="checkbox"/> NO IF "YES" GIVE DETAILS		
20 REMARKS		
I CERTIFY THAT THE ENTRIES MADE BY ME ABOVE ARE TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND ARE MADE IN GOOD FAITH. I UNDERSTAND THAT A KNOWING AND WILLFUL FALSE STATEMENT ON THIS FORM CAN BE PUNISHED BY FINE OR IMPRISONMENT OR BOTH (See U. S. Code, title 18, section 1001)		
DATE	SIGNATURE OF PERSON COMPLETING FORM	
	TYPED NAME AND ADDRESS OF WITNESS	SIGNATURE OF WITNESS
21 THIS SECTION TO BE COMPLETED BY AUTHORITY REQUESTING INVESTIGATION		
BRIEF DESCRIPTION OF DUTY ASSIGNMENT AND DEGREE OF ELASSIFIED MATTER (top secret, secret, etc ) TO WHICH APPLICANT WILL REQUIRE ACCESS		
RECORD OF PRIOR CLEARANCES		
DATE OF CLEARANCE	TYPE OF CLEARANCE	AGENCY THAT COMPLETED INVESTIGATION
REMARKS		



## DEPARTMENT OF DEFENSE SECURITY AGREEMENT

1. I understand that by virtue of my duties, on the staff of the \_\_\_\_\_, I may be the recipient, from the Department of Defense, of information, material, plans, or intelligence which concern the future security of the United States and which belong to the United States Government. I have received a copy of, and I understand the provisions of the Espionage Act, Title 18, USC, Sections 793 and 794, as amended, concerning the disclosure of information relating to the National Defense of the United States and I am familiar with the penalties provided for violation thereof, and I have read and understand Title 18, USC, Section 1001, regarding the making of false statements.

2. I agree that I will never divulge, publish or reveal, either by word, conduct, or by any other means, any classified information, intelligence, or knowledge, except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing in each case by the Secretary of Defense. Should an attempt be made by any unauthorized person to solicit classified defense information from me, I agree to report without delay any such incident to the Director of Security Services (OSD), or to the Federal Bureau of Investigation, or to the nearest Department of Defense security office or Provost Marshal, or to the security officer of the U. S. Embassy or U. S. Consulate.

3. I agree to return all classified material upon the termination of this employment.

4. I understand that no change in my assignment or employment will relieve me of my obligation under this agreement and that the provisions of this agreement will remain binding upon me even after the termination of my service with the United States.

5. I take this obligation freely, without any mental reservation, or purpose of evasion, present or future.

In witness where of I have set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

WITNESS

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name



EXCERPT FROM ESPIONAGE ACT

(Title 18, United States Code)

Section 793. Gathering, transmitting or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, files over, or otherwise obtains information concerning any vessel, aircraft, port, battery, torpedo station, dockyard, canal, railroad, fueling station, fort, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research or development establishment, or station connected with the national defense owned or controlled, or under the control of, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war, are being made, prepared, repaired, stored, or are the subject of research or development, or under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense) or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense) or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter) or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer— Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

Section 794. Gathering or delivering defense information to aid foreign Government.

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans, or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measure undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

Section 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency, of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device, any material fact or makes any false, fictitious or fraudulent statement or representation, or makes any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

OFFICE OF THE SECRETARY OF DEFENSE CERTIFICATE OF CLEARANCE		DATE
NAME (Last, First, Middle)	DATE AND PLACE OF BIRTH	
GRADE AND SERVICE (Military Only)	ORGANIZATION AND JOB TITLE	
SOCIAL SECURITY NUMBER		
INVESTIGATION		
TYPE	CONDUCTED BY (Agency)	
LOCATION OF FILE	DATE INVESTIGATION COMPLETED	
CLEARANCE		
DATE CLEARANCE GRANTED	HIGHEST CLASSIFICATION TO WHICH ACCESS IS AUTHORIZED	
DATE ADDITIONAL INVESTIGATION REQUESTED		
This is to certify that the above named individual has been cleared for access to classified information and material of the classification indicated. This clearance is granted in accordance with existing "Policy on Investigation and Clearance of DoD Personnel for Access to Classified Information," as established by the Secretary of Defense and other appropriate regulations.		
REMARKS		
SAMPLE, FOR DISPLAY PURPOSE ONLY		
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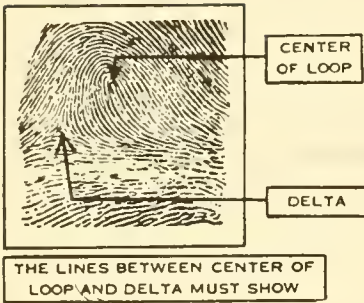


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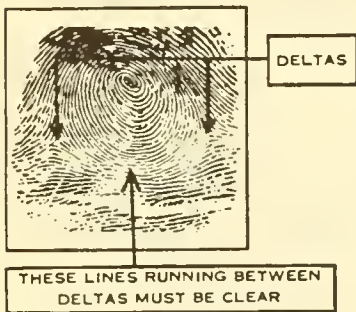
**FEDERAL BUREAU OF INVESTIGATION  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20537**

**APPLICANT**

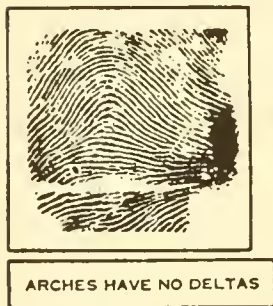
**1. LOOP**



**2. WHORL**



**3. ARCH**



To obtain classifiable fingerprints:

1. Use printer's ink.
2. Distribute ink evenly on inking slab.
3. Wash and dry fingers thoroughly.
4. Roll fingers from nail to nail, and avoid allowing fingers to slip.
5. Be sure impressions are recorded in correct order.
6. If an amputation or deformity makes it impossible to print a finger, make a notation to that effect in the individual finger block.
7. If some physical condition makes it impossible to obtain perfect impressions, submit the best that can be obtained with a memo stapled to the card explaining the circumstances.
8. Examine the completed prints to see if they can be classified, bearing in mind that most fingerprints fall into the patterns shown on this card (other patterns occur infrequently and are not shown here).

This card for use by:

**LEAVE THIS SPACE BLANK**

1. Law enforcement agencies in fingerprinting applicants for law enforcement positions and applicants for licenses or permits required by local ordinance or official regulation. The reason for fingerprinting must be shown in appropriate block.

2. U.S. Government agencies in connection with clearances. Identity of private contractor should be shown in space "Company and Address." The contributor is the name of agency submitting the fingerprint card to the FBI.

FBI number, if known, should always be furnished in appropriate space.



Senator CHILES. Our next witness will be Congresswoman Mink of Hawaii.

**STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE SECOND CONGRESSIONAL DISTRICT OF THE STATE OF HAWAII**

Mrs. MINK. Thank you very much, Senator.

Senator CHILES. We are delighted to have you. I think we realize that you led the court battle of 1971 to make public documents relating to possible environmental effects of the underground nuclear explosions in Alaska. We know that you lost your case, but you won added respect for your efforts, and we look forward to your testimony on the consequences of the Supreme Court ruling in your case and your recommendations for a legislative response to problems that decision creates.

Mrs. MINK. Thank you very much, Senator. I appreciate very much this opportunity to testify on behalf of one specific bill at least, Senate 1142, which was offered by Senator Muskie. As you know, I am a cosponsor of this legislation in the House, and I believe its adoption is essential if we are to really preserve freedom of information in its purest context.

Unfortunately the Freedom of Information Act has been placed under concerted attack, not only by the executive branch, but also by the judicial branch as a result of the decision which was rendered in my case against EPA.

To restore the purposes of this act, I believe it is essential for the Congress to enact strong legislation to require full disclosure of Government information not only to the Congress, but also to the people.

In 1972, when I testified before a House subcommittee, I favored a judicial watchdog system for freedom of information in America. When the executive refused to disclose information, I thought it would be sufficient that the matter could be appealed to the courts, the court would be expected to examine these documents in camera to see whether a full or partial disclosure should be required.

In making this recommendation, I placed my trust in the independence and the integrity of the judicial system to safeguard this fundamental liberty. Subsequent events, however, brought me to the reluctant conclusion that this protection would be inadequate.

I believe that Congress itself must grasp the power to require the disclosure of government information when the executive and judicial branches will not.

When Congress enacted and the President signed the Freedom of Information Act in 1967, its purpose was to require the disclosure of all Federal Government information to any member of the public. The only exceptions to the disclosure requirement of the law were materials which were included in the nine exceptions set forth in the Freedom of Information Act. Of these nine exceptions, the first has proved the most vexatious. It applies to matters that are "specifically required by Executive order to be top secret in the interest of the national defense or foreign policy." The national security exemption, originally intended by Congress to be narrowly construed and implemented, has instead been enlarged and expanded by the executive branch to encompass virtually any information the Executive desires to withhold.

Under the slipshod and illicit procedures devised by the executive to withhold information under the national defense exemption, an army of bureaucrats have been allowed to classify and withhold information at will. According to newspaper reports of the Ellsberg trial, the man who originally classified these documents top secret acted on his own authority and judgment. The only training or instruction he ever had in security matters was watching a movie which had the theme "Beware of blondes who are excessively friendly; they may be Russian spies."

In 1971, 32 other Members of Congress and I filed the first Freedom of Information Act suit ever to reach the U.S. Supreme Court. As members of the public and as lawmakers who had to vote on funds for a dangerous underground nuclear test, we sought information on that test prepared by the Government's environmental agencies, which are responsible under our laws for informing the public on environmental hazards. The executive branch opposed us every inch of the way. When the U.S. Court of Appeals was audacious enough to insist that the documents be submitted to the court for an examination in camera to see which ones should be released, the executive branch sought refuge by Supreme Court review of this as a threat upon its right to withhold information for any reason.

On March 6, 1972, the Supreme Court agreed to review this decision. Two days later, the executive branch issued an order revising its security classification system. Henceforth documents were to be separately classified on a paragraph by paragraph basis to facilitate classification in the event it was needed. This ratified one of the contentions of our suit, that the documents I sought could not be classified in their entirety merely by being stapled together with another document which was obviously classified top secret, such as the AEC report.

On January 22d of this year, the Supreme Court issued its decree in the *Mink v. EPA* case,<sup>1</sup> which in my view proved a disaster to the Freedom of Information Act. In essence, it upheld the correctness of everything the executive had done to withhold this information from the Congress and from the American people. The most damaging part of the decision was the nullification of the doctrine of judicial review. The court held that there was no requirement for an in camera inspection of the documents in question to see whether they should be withheld, to see whether they were really covered by the exemptions under national security and foreign policy requirements. And they really affirmed the notion that a simple statement by the executive branch that the classification was appropriate was sufficient, and was beyond review by the Court. There was just no check and balance left against arbitrary decisions on the part of the executive to withhold information merely because it was sensitive or embarrassing.

The Court's preoccupation with national security secrecy was further illustrated on February 5, 1973, when the Chief Justice sent to the Congress 77 proposed new rules of evidence for use in the Federal judicial system. One of these rules, No. 509, sought to apply the grossly expanded "national defense" loophole to bar any such evidence in Federal courts. Under this rule, an attorney representing the Gov-

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<sup>1</sup> See Appendix, Volume III of these hearings, Freedom of Information, Part 2, Court Decisions.



ernment could object to the production of a record on the grounds that disclosure would be "contrary to the public interest." In effect, this would bar disclosure of all Government documents unless the private citizen or other plaintiff was able to prove that disclosure was in the public interest. Fortunately, Congress has deferred the otherwise automatic implementation of this and other controversial rules sought by the Court.

I might also mention another example of executive efforts to build upon the new-found secrecy power it has gained through palpably erroneous interpretations of the national defense loophole in the act.

Last October, Congress approved legislation declaring that meetings of the hundreds of Government advisory committees "shall be open to the public." We provided, however, that this requirement would not apply to meetings where discussions are held of matters exempted under the Freedom of Information Act from public disclosure. Predictably, the Government has seized upon this tiny loophole to close those open meetings. Apparently before the administrators will obey our 1972 law, we will have to tighten up the Freedom of Information Act.

As for S. 1142, it would make some of these necessary revisions. One change would be to amend Section 3 to enlarge the right of the public to information. Section 3 would also be amended to require all agencies to furnish any information or records to Congress or any committee or subcommittee upon request. This is along the lines of the existing 1928 statute which requires the production of information upon the request of any seven members of the Committee on Government Operations in the House, and five members in the Senate.

This change is a logical and essential step in my view. I would go further. I would urge that if Congress is to become a truly coequal branch of Government, we must have equal access to Government information. This means the establishment of a principle that Congress has the right to all information and its classification or release.

As elected officials, each of whom has a constituency, at least in the case of the House, of at least half a million people, we have as much right to decide which information shall be released to the public as faceless appointed officials whose only qualification is that they watch spy movies. Members of Congress should be entitled to any executive branch information, classified or not, upon request of any 10 Members. I would only require that Members be responsible for the safe custody of the information if it were classified. If Members should want to obtain the declassification of these materials in order to release it to the public, I propose a new mechanism for congressional determination of declassification. I propose the appointment of a special joint committee of the House and Senate. This committee would have the lawful power to declassify any security information. If a Member obtained information and wished to have it declassified, he could refer it to this committee for a required swift decision.

Closed hearings or consultations with the executive branch could be held by the committee prior to rendering its decision. The key factor would be that Congress, the elected representatives of the people, would have this power to declassify.

I feel that the appointment of an outside commission or body for this purpose is an inadequate remedy. Neither should it be required

that a congressional resolution be passed by the entire House or the entire Senate to release such information. Free access to information gathered by our tax dollars is a public right and elected representatives should have the power to decide this issue.

A house bill, H.R. 4960, authorized by Congressman Horton, contains a provision which is also well deserving of your consideration for inclusion in any legislation that you may approve. It proposes a mandate that a court shall enjoin refusal to release information not exempted from disclosure under the act. I think that that would be an improvement of the current act's permissive authority of the courts.

Our bill, which I cosponsored with Senator Muskie, provides for the payment of attorney fees and court costs to a successful litigant under the act. I feel that this should be extended to costs and fees at any level in which the litigant is upheld by the court and not only in cases where the final decision is in favor of the litigant. I believe that certainly in the *Mink* case, our costs should have been reimbursed by the Government.

Where the Supreme Court remands the case, I believe that all costs and fees ought to be borne by the Government. This is certainly a small price to pay for the protection of freedom of information.

In addition, our bills fail to change the existing definition of national security information exempted from mandatory disclosure. We should require that any such information be separately classified by its own Executive order rather than apply one general order as was done in the *Mink v. EPA* case. Further, the test of whether the material is secret and "in the interest of national defense or foreign policy," allows too much leeway for the executive. We should specify in the exemption that only materials whose disclosure would damage current foreign policy activities or reduce the Nation's ability to defend itself against military attack should be exempt.

It seems to me that strong limitations against secrecy must be invoked by Congress. We have to guard against inadvertently contributing to the suppression of information from the American people and from ourselves.

I urge this subcommittee to work toward high standards for openness in all aspects of our Government operations.

Secrecy must only be tolerated in cases where release of the information will seriously jeopardize our national security or endanger the stability of our foreign relations.

Embarrassment of the executive such as providing internal arguments made against a policy should never be a reason to keep a report secret. The public should be advised of all sides of an issue. The executive must not be characterized as a propaganda agent of its decisions. Executive policy should be able to stand the light of full public review. If it is correct, it will be upheld. All of the facts should be made available to the public. We cannot rest until our laws are perfected to safeguard this fundamental principle of a free society.

Thank you very much.

Senator CHILES. We certainly want to thank you for your fine statement and the work that you have done in this area. You said that you had reached the reluctant conclusion that you no longer felt the courts could deal with this. I would just like to have your thinking because of the results of your case and other things that have happened recently in the courts. Do you think that Congress can deal with this? Do we have too many secrets in Congress?



Mrs. MINK. Too many secrets ourselves you mean?

Senator CHILES. Yes.

Mrs. MINK. Well, I think we have made some rather successful efforts to open up our meetings and to insist upon public access to our deliberations. While I will admit we have been guilty in the past I think a new dawn of operation has come to both the House and the Senate. In keeping with that it seems to me the next logical step is to insist on openness in all activities of the Government.

Senator CHILES. I think this is a very beneficial movement. I hope that it is a beginning of something that will even widen. I think it is kind of hard for us to remove the speck from our brother's eye before we cast it out of our own. I also think, and I wonder what your thinking on this is, that since Congress has begun to open up its own meetings, we seem to be more aggressive in pursuing the Freedom of Information Act, executive secrecy, executive privilege and all of these other policies that we know have been going on for so long.

Mrs. MINK. Well, I think that the difficulty there is that this seems to be a reactive process and one doesn't know whether this same kind of momentum and interest in the area of freedom of information can be maintained in the absence of some of those outside crises; and yet it seems to me that this is really the most fundamental issue in a complex society like ours, which we must deal with. It is obviously more simple for us to simply shirk our responsibilities and say, well, this can be delicately handled by the executive or this is not an area in which I have any expertise and therefore why should I get involved. But if we are to reassert the principle that we are a coequal branch, equally responsible for the conduct of our Government affairs—and I believe that that is the principle of American Government which the public is insisting that we pursue apart from these crises—we must insist on the concept of freedom of information. The people are saying, come on, Congress, get with it; you failed to end the war; you failed to do so many things; we expect you to reassert your control over this Government—so this certainly is one area that we can demonstrate a willingness to assume a burden which I think is essential.

It is too easy for us to say merely that those reports are not available to us. The easiest thing to do is to go along with the decision that has been made for us and whose arguments have been prearranged. Everybody is busy, but I think that the responsibility is certainly ours, and we ought to assert it. If the executive decides that for its thousands of employees it is useful to have a classification system in order to determine who can read what and who shouldn't read what, that system of classification should not be used to deny us information which is essential for our deliberations until we ourselves have had an opportunity to make a judgment as to whether that classification is valid or not. That is what we have failed to do, I think.

We simply sat around and accepted the decisions of the executive. And if we are in a constitutional crisis with regard to many of these issues, impoundment and so forth, I think we are certainly in one with respect to the matter of executive privilege which is a wholly different issue compared to the one that I was involved in in my law suit.

Senator CHILES. In the joint committee that you recommended for Congress to be able to review and declassify, should there be some appellate process for that?

Mrs. MINK. No; I believe we are equally capable as any agents or clerks in the executive to make the determination in the best interest

of this country in terms of national security. If anything, we are going to be far more conservative in our deliberations because we have to answer directly and immediately to the people regarding what choices we make.

Senator CHILES. You wouldn't give the executive any appellate review of the decisions?

Mrs. MINK. No; I would not, because that would damage the whole principle of equality. I would rather not have a joint committee at all and simply let this intolerable system continue. But if we are to establish a joint committee, then it ought to be thoroughly independent and autonomous to make these decisions. That doesn't qualify the right of a member to get any information. I think any 10 members ought to be able to get all information. This is only regarding the question as to whether the material goes into the area of national security or foreign policy and therefore would not be made public.

In many cases, it is simply a question of time limits. It is not the material itself but it is only whether it is timely for it to be released, and certainly these questions could be gone into by the committee. The Executive himself has issued new guidelines saying that there should be mandatory review every so many years and ultimate disposition in 10. Our people would argue that 10 years is too long. I do believe that we are equally capable, equally concerned about the future of our country, equally knowledgeable about the delicacies of foreign relations and diplomatic relations and national defense issues to make a judgment as to whether the issues are so sensitive that the American people should not have access to it.

Senator CHILES. Well, thank you very much.

Mrs. MINK. Thank you very much for inviting me to testify.

Senator CHILES. We will recess our hearings until tomorrow morning at 10 o'clock.

[Whereupon, at 11:30 a.m., the subcommittee recessed to reconvene at 10 a.m., Thursday, May 10, 1973.]



# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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THURSDAY, MAY 10, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS; SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE ON THE JUDICIARY; AND SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE JUDICIARY,

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 3302, Dirksen Senate Office Building, Senator Sam Ervin presiding.

Present: Senator Ervin.

Also present: Rufus L. Edmisten, chief counsel and staff director; Telma P. Moore, executive assistant; Walker F. Nolan, Jr., counsel; Joe L. Pecore, assistant counsel; Philip B. Kurland and Arthur S. Miller, consultants, Subcommittee on Separation of Powers.

Senator ERVIN. The committee will come to order.

Counsel will call the first witness.

## STATEMENT OF CLARK MOLLENHOFF, WASHINGTON BUREAU CHIEF, DES MOINES REGISTER AND TRIBUNE

Mr. MOLLENHOFF. Do you wish to swear me?

Senator ERVIN. No.

Mr. MOLLENHOFF. I have the feeling that all testimony before congressional committees should be sworn, but if you will give me a pass, it is all right.

Senator ERVIN. Well, I have known you a long time now, and you have convinced me that you tell the truth.

Mr. MOLLENHOFF. Mr. Chairman: Events of the last few weeks have demonstrated more clearly than any complicated legal study possibly could the full evil of executive privilege as a justification for arbitrary secrecy practices in the executive branch.

My personal experience in the A. Ernest Fitzgerald case demonstrated to me how such arbitrary secrecy practices could have been used by the Air Force and the Nixon White House to hide evidence of the crimes committed against an honest man.

You recall that Fitzgerald, an Air Force cost analyst, was fired by the Air Force after he testified about the billion-dollar cost overruns on the C-5A jet transport. The decision to abolish his job through a

reduction in force was a subterfuge that was apparent to Senators, Congressmen, and editorial writers. Yet the Air Force Secretary and his minions blandly denied it, and then put out malicious smear stories that Fitzgerald was really a bad guy; that he had violated security and had been involved in some vague conflict of interest.

The smear was for the obvious purpose of cooling any White House or congressional enthusiasm for an in-depth investigation of the firing. Air Force officials apparently had full faith that the Justice Department and the Civil Service Commission would cooperate in their conspiracy to end Fitzgerald's career in Government by foul or fair means.

The Air Force officials declined to testify at a Civil Service Commission hearing concerning their conversation with the White House in connection with the decision to fire Fitzgerald. They claimed some kind of a vague privilege which I assume was executive privilege to refuse to testify.

In this instance key documents were made available to Fitzgerald that established the pattern of Air Force activity in the crucial period and that the President and other key White House officials had been notified of the facts relative to the firing.

All of this information on Fitzgerald's side of the case would not have been available to him if the communications with White House personnel had, in fact, been covered by an executive privilege.

More recently, the Watergate affair has dramatically demonstrated the wide range of crimes that could go unpunished if officials of the White House are permitted to arbitrarily bar congressional committees and the courts from testimony or documents simply because they involve White House communications with others in the executive branch.

In the Watergate case there was evidence of obstruction of justice for months while the President and the White House spokesman issued broad denials of any White House personnel participating in the burglary, the bugging, or the general conspiracy.

If we are able to believe what President Nixon tells us of his lack of knowledge of the burglary, the bugging, or the coverup, then we must assume that President Nixon was indeed the greatest victim of the executive privilege shield that he had tried to pull around his White House. If he did not know what his aides were doing, it was because they lied to him, with false confidence in their power to use him and his good name to cover up their sordid obstruction of justice, bribery, perjury, and falsification of documents.

If the President is accurate in stating that he did not know about the coverup, he should be appalled that his aides misled him with lies or deceptions. Mr. Nixon should be thoroughly disgusted with the situation that this evil secrecy doctrine has created for him.

President Nixon should realize that he is the greatest victim of the sinister executive privilege claims that he and his administration have been disseminating. If John W. Dean III and his other aides had not been so confident that they would be shielded from telling the truth to Congress, or even making an appearance before a committee, they might have been more forthright at any earlier date in their communications with the President.



Now, according to the picture as presented to us by the President, some of his most trusted assistants were scheming together to keep him from learning what they had done. The fact that they believed they could avoid producing documents for Congress or the courts, and also avoid testimony under oath, would surely have made them more bold in this obstruction of justice and the multitudinous other crimes that were a part of the overall coverup.

There is no law that sustains executive privilege, and Congress should make no law that recognizes this privilege, even in a limited sense. There are no Supreme Court cases that sustain the broad executive privilege claims that the administration is asserting.

There is no logic that can sustain executive privilege in a democracy, for to permit the President or the executive branch to have such authority to refuse to testify or produce records is to accept the fact that there is no accountability to Congress or the people.

The Fitzgerald case demonstrates the extreme evil that executive privilege can be in hiding relevant facts from the public in an Air Force conspiracy to destroy a truthful witness.

I might note here that I think the Fitzgerald case is quite significant in connection with the nomination of Elliot Richardson. From the first of this year Elliot Richardson has had a direct responsibility in connection with the Fitzgerald case. As the Defense Secretary he has had the overall view that includes the Air Force. It is possible that the Defense Secretary might have been unknowing about the details of the injustices of this case up until sometime in February. But from February on, there was absolutely no reason for the administration—and that includes Ron Ziegler, the President, and Mr. Richardson—to be unaware of the facts. Richardson would be kept advised of everything in the Defense Department, at least routinely, and in that respect would be at least routinely responsible for a coverup of the Fitzgerald case.

I know from my own personal knowledge that the President and Ron Ziegler and John Dean were apprised of all the material facts in the Fitzgerald case at sometime in mid-February. I wrote a letter on February 13 to the President which was hand delivered to Ron Ziegler, which Ziegler assured me he hand delivered to the President. I got the response from Dean, who in conversations indicated that the President had seen it.

I heard from both Dean and Ziegler that the President had seen it.

I was told by Dean that he was going to get this thing straightened out. He had a few problems of his own during that period of time and I guess he can be excused for not giving full attention to the Fitzgerald coverup.

Mr. Richardson, at the time stories were written about my appearance before the Civil Service Commission, had an affirmative responsibility to look into this and to find out what the conspiracy was because I stated very clearly, and it was very clearly reported, that there was a coverup by the Air Force under his jurisdiction.

Richardson did not follow through on it. I have been unable to get any answer from the White House on this in the last weeks. I have taken it up personally with Ron Ziegler, that monument of noninformation at the White House. He informed me yesterday that I would

receive a call from Jerry Friedheim at the Defense Department. I have received no call to this date.

I have insisted that they give me their explanations in writing.

I submit for the record at this point an article that I did on another case that is in Mr. Richardson's jurisdiction. I go into these matters simply because they are tied so much to the problems of executive privilege which is the overall basis for coverup in the administration. It is the ultimate device, where you don't have to use national security; you don't have to use any specific law. You just say the President has decided that these papers, this testimony, will not be made available to Congress.

[See "Mollenhoff Exhibit," Appendix, Volume III of these hearings, Executive Privilege, Part 6, Miscellaneous Background.]

Senator ERVIN. Sometimes I think that a proper name for executive privilege would be the executive fifth amendment.

Mr. MOLLENHOFF. That is the conclusion I have come to and I have been dealing with this problem over a period of the last 20 years. I must say that I have been surprised at President Nixon, because I talked with him about this specific problem before he was elected, and then after he was elected. I thought he had a comprehension of how the executive privilege device was actually a disservice to the President. Frequently it keeps the President from knowing the worst facts about his administration until it is too late. The Watergate is one of these examples, if we are to believe President Nixon's present version. I am not sure about that yet.

I might read a paragraph from the letter to the President of February 13, 1973, dealing with the *Fitzgerald* case.

The unconscionable Air Force cover-up of the Fitzgerald case is another argument for a maximum of open government and a minimum of secrecy in government proceedings. As you know, I disagree with your present posture on executive privilege and will not avail myself of it under any circumstances. It is a disservice to the President more than anyone else, because he is usually the one most in the dark about the petty and dishonest activities of his subordinates who control the flow of information to the President.

That was written February 13. President Nixon did not heed that warning at that stage and apparently awakened sometime in April to the fact that he had a problem.

I noted at that time that:

I am in good company in my view on executive privilege, for it was expounded forcefully and eloquently by Richard M. Nixon as a Congressman and a Senator who was aggressively impatient to expose the spoils of democracy.

I had quoted to Mr. Ron Ziegler earlier Mr. Nixon's statement in 1948 when he was involved in investigation of the loyalty program in Truman's administration. Representative Nixon denounced executive privilege on the House floor, saying:

This cannot stand from a constitutional standpoint because had this arbitrary secrecy been permitted to prevail, the Teapot Dome scandals could have been covered up, the Bennett Meyers scandals could have been covered up.

He indicated some comprehension of the problem.

I don't know when the President got off the track but it was sometime after I left the White House.

Senator ERVIN. According to the letter written by John W. Dean, as the President's counsel, a year before the Judiciary Committee hearings on the Gray nomination, Mr. Dean said it was not a privilege



existing in all cases and no President ever claimed it and President Nixon didn't claim it.

Mr. MOLLENHOFF. I think this has been a developing doctrine as the problems of the Watergate have expanded their needs for executive privilege.

I thought it was rather inconsistent and a conflict of interest—the fact that John Dean was drawing up the legal papers on executive privilege for the President when at the same time, as it now comes out, he was involved as the master workman, probably not the mastermind, in the White House coverup of the Watergate affair.

Senator ERVIN. I think the first time that they invoked the executive privilege as an absolute bar to compel the testimony of any White House aid was when the Judiciary Committee asked for the testimony of Peter Flanigan.

Mr. MOLLENHOFF. I recall that and wrote a column on it. I was viewing it with alarm that the committee had made a compromise in that particular case to permit only limited questioning of Flanigan. In March of 1970, while I was in the White House, the problem of the Tenneco Tanker affair came up. There was a decision that would have given a windfall profit of something like \$3 million to a firm in which Flanigan had been a participant only a matter of days before the decision took place.

I recall in that particular case. Peter Flanigan had complete confidence that he would not have to testify before the Senate Commerce Committee or the House Commerce Committee because he had an executive privilege that covered everything he did, regardless of whether the President knew about it.

I pointed out the dangers of the doctrine at that time to a large group that included Flanigan, John Ehrlichman, Haldeman, and Bryce Harlow. I told them that even if they asserted executive privilege, it could not prevail because in the end executive privilege has no legal basis. It is only as good as whatever the political force you have on your side. If you are wrong on the facts and the general political situation, you can't get by with it.

In the ITT case, they were wrong on the facts. They were wrong in the general political situation, but they halfway got by with it because Mr. Flanigan came up and did not have to answer all the questions.

I am still rather curious to know what the answers to some of those questions in the ITT matter might be.

When I was in the White House I took my book (Washington Coverup) around to miscellaneous people and urged them to read it. I had some conversations about this with Jeb Magruder when he was detailed by Haldeman to take administrative charge of Klein's shop.

I went in to see Magruder because he obviously didn't know anything about the communications business; he had been in advertising and that kind of hokum.

I talked to him about responsible government accounting and the principle of executive privilege and I gave him a copy of "Washington Coverup." I remember I endorsed the book to him—signed it. I don't remember what I signed or what I told him, but I am sure if he heeded the advice, he wouldn't be in the trouble he is in today.

Senator ERVIN. I don't know anybody that has fought harder for open government, than you have, and that goes back a long way, since I first knew you.

Mr. MOLLENHOFF. It goes back a long way now.

I must say, concerning executive privilege, the Watergate matter may be a blessing in disguise. The fight for open government was very difficult for a long period of time. In the mid fifties, this was particularly true. When the Eisenhower administration was involved, it was difficult to sell any real concern about a dictatorship. It was hard to imagine President Eisenhower as a dictator.

Senator ERVIN. In that capacity, he would be a benevolent dictator, at the worst, I think.

Mr. MOLLENHOFF. I recall I testified before the Moss subcommittee in 1955 on this subject, and I think I was the first one to really draw attention to the potential in executive privilege.

I remember at that time, that I warned that you shouldn't trust a good man with powers that you would not want a bad man to have; and that good men with good intentions can be destroyed by power.

I am inclined to think that that is what has happened in the present case.

Most of these young men over in the White House were quite intelligent young men, industrious, energetic and bright, but they were misled by the false security of believing that anything and everything they did could be kept secret.

Haldean and Ehrlichman are really the men who are responsible for this because they were obsessed with the need for secrecy. I can see now, with Watergate unfolding, why they were probably obsessed with it. I am not sure they were engaged in this kind of questionable activity during the time I was at the White House.

In fact, I was supposed to keep them out of this kind of activity, so I hope they weren't.

Senator ERVIN. Well, I am sure if they heeded you, they would not have engaged in such activity. As I recall the *Fitzgerald* case, there was a hearing before the Civil Service Commission, and Fitzgerald claimed that his job had been unlawfully abolished; isn't that true?

Mr. MOLLENHOFF. That is correct.

Senator ERVIN. And the hearing examiner refused to allow, or at least to compel, the witnesses who had knowledge of the matter to testify.

Mr. MOLLENHOFF. That is correct. The hearing examiner granted whatever privilege it was.

I might say—and I can say this in testimony here because I have said it to his face and I said it to his face in the hearings—Herman Staiman is a biased hearing examiner. He is in the pocket of the Air Force. This is demonstrated by the fact that initially, he was insisting that the Civil Service Commission go forward with a secret hearing.

Now, this was a secret hearing in a situation where Fitzgerald wanted an open hearing. The Air Force wanted a closed hearing.

There are no provisions for closed hearings, but the hearings are closed for the benefit of the employee when there are circumstances that he might want to keep out of the public domain.

There is no reason why the Air Force, as the Government agency, should be protected from coming forth with its case when the employee wishes it in the public domain.



Herman Stamin ruled that it was proper to have a closed hearing. Judge William Bryant, in the District Court, disagreed and said the due process required that there be an open hearing.

Then the Civil Service Commission and the Justice Department—I can never understand why the Justice Department took part in this effort to cover up the hearings and hold them secret—appealed to the appeals court.

The appeals court, in a unanimous decision, said it had to be an open hearing. This was a unanimous decision that included Judge Tamm, who was a conservative; Judge Dave Bazelon, who is a liberal; and Judge Bernita Matthews, senior judge, retired.

But this demonstrated to me that Chairman Hampton of the Civil Service Commission and the hearing examiner had no real concept of the meaning of due process for Government employees. They envisioned themselves as an instrumentality for the enforcement of whatever the Government agencies wanted done.

In this case it was the Air Force that wanted to crush Fitzgerald, wanted to punish him, and the Civil Service Commission was going along.

When the hearings were held out in the open, it became apparent why the Air Force wanted closed hearings. They had no case. They had been around spreading stories that Fitzgerald was involved in some security violation. They had also been spreading stories, as late as November of 1969, that he had some conflict of interest.

Their own investigation records show that some Air Force officials had raised questions about a security violation by Fitzgerald in giving Proxmire's committee information about the C-5A, and that there had been a question of conflict of interest raised against Fitzgerald. That was in May and June of 1969.

The Office of Special Investigations of the Air Force, headed by General Cappucci, had gone into that despite the fact they were vague, general charges and had washed them completely out by August of that year. Yet, Air Secretary Seamans and Schedler, his deputy assistant, and a Colonel Pewitt, were indicating in October and November that there was something bad in Fitzgerald's record. When I questioned them about Fitzgerald's record, they were very vague and they didn't want to tell me.

Well, as the facts became known, there wasn't anything in their records. They were using this whispering smear technique to destroy Fitzgerald and that is particularly bad when it is done by Government officials acting in their capacity as Government officials.

Senator ERVIN. Is it fair to say that Fitzgerald had to deal with a public official, namely, a Senator, that he had to show inefficiency in the duties of carrying—

Mr. MOLLENHOFF. Inefficiency that cost the American taxpayers something like \$1 billion, and that is not a small amount even in this day and age.

Senator ERVIN. From your experience as a journalist, do you not entertain the opinion that about the only way that the public can learn that its Government is guilty of corruption or inefficiency is through information supplied by the people on the inside of the Government who have personal knowledge of these matters?

Mr. MOLLENHOFF. That is the only way that it is possible to expose wrongdoing and corruption in Government.

I have watched this here in Washington since the 1950's. Tax scandals of the Truman administration were not known by Mr. Truman initially. The scandals were in fact going on and there were many people in the Congress—Senator Williams would have been one of the leaders in that particular investigation—who knew about this.

But the secrecy at the Internal Revenue Service in the handling of tax matters was one of the things that kept the public and the press, and the President in that case, from knowing about it.

I thought that after that experience all Presidents would see that such secrecy was self-defeating—that their own aides would keep things from them. Yet President Eisenhower came along and he was unaware of the basic conflicts of interest in the Dixon-Yates case until I raised it at the press conference and pushed through on two or three questions that made him very angry at the time.

President Eisenhower found out, within a matter of 2 or 3 days, that Adolph Wenzell was in a conflict of interest position. Wenzell was a vice president of the First Boston Corp., and he was also serving in the Government on the same project as an adviser to the Bureau of the Budget and the Atomic Energy Commission. This was unknown to President Eisenhower when it was brought up in the press conference in July of 1954.

Later, there was the Adams-Goldfine case, where various contacts were made by Adams for Goldfine at SEC and the Federal Trade Commission.

President Eisenhower was unaware of this because of the secrecy in the administration. The first efforts of a congressional committee to look into the matter were stopped by use of executive privilege.

In that case it was an extension of executive privilege to the independent regulatory agencies. I can recall some of the legal scholars at that time were appalled by this concept. I remember that Senator Hennings was one of those concerned about it. In fact, he took Attorney General Bill Rogers over the coals at the committee hearing.

I had some comment on that in my book, which demonstrates that Bill Rogers, who is now, of course sitting peacefully by up at State, was really the father of the executive privilege doctrine as we know it today. In testimony before the Hennings committee in 1958, Rogers set out a pattern that was little less than what Kleindienst was talking about in April.

It was just as absurd and just as far-reaching—that the President has the power to withhold all information from the Congress at any point.

Senator ERVIN. Well, isn't the claim of executive privilege a direct descendant of the old common law theory that the king could do no wrong and was not answerable for his conduct?

Mr. MOLLENHOFF. That point was made in some of the early studies by the Moss committee on this subject in the mid-1950's. The only thing that there is to support the whole theory is various Attorneys Generals' opinions over the years, which really are no more than the king's lawyer saying the king is all-powerful and can do no wrong. That is hardly a sound government doctrine for democracy.

Senator ERVIN. Isn't it true that if our institutions of Government are to function in an honest and efficient manner, the country requires the full and free flow of information concerning Government activi-



ties? Anything which tends to prevent the public from learning about Government activities of a corrupt or inefficient nature is absolutely detrimental to the best interests of this Nation, is it not?

Mr. MOLLENHOFF. Thoroughly contrary to the whole doctrine of fair play, which is really the basis of operational democracy. We have to have a Government that at least in theory tries to arrive at fair decisions for all the people in all of the agencies.

When it operates other than that, there is a tendency by the agency heads to want to cover up their own tracks, their own involvement, and thus it will always be. One has to protect against it by providing for accountability to the Congress. Every time that Congress is stopped, the public is stopped.

I have total faith in the fact that a Congress or a congressional committee that is peopled by Members from the liberal to the conservative spheres will ask the questions that I would ask, or that anyone else with any differing political belief might ask, of the witnesses before the committee. Eventually they will get to the truth.

My concern has been for the lack of courage on the part of congressional committee chairmen and the lack of knowledge by committee chairmen of their own important role in these matters.

Your position relative to the Watergate matter recently has been really the best, strongest, most dramatic thing that could happen.

John Moss and Senator Estes Kefauver are others who have had a deep understanding of this problem.

Senator McClellan has a great understanding of it and Senator Morse would have been among others of the Senate who have had a great understanding of this.

Too often, the committee chairmen get into relationships with the agencies that they are supposed to police, or their staff members do, which hinder their doing an adequate job in insisting upon accountability from the agencies.

There are all types of interesting arrangements that take place to accommodate both sides and it does make the work easier. But there is a natural adversary relationship that should exist between Congress and the agencies that it polices, and it cannot become a cozy relationship under any circumstances.

Senator ERVIN. One more question about the Fitzgerald matter: What eventually happened to Fitzgerald?

Mr. MOLLENHOFF. At the present time, his hearing has been concluded and it will be before Staiman for a decision. I have some doubts about how objective Staiman will be on this.

I figure Staiman has about as much chance of being objective as Elliot Richardson has a chance of being objective, and I don't think, examining the record, there is very much chance.

Senator ERVIN. There are two other experts of the Government with about the same chance of Fitzgerald, as I understand, one for reporting larceny of considerable amounts of petroleum in Vietnam, who after a ruling, was eventually restored to position.

Mr. MOLLENHOFF. It seems to me that, in nearly every year that goes by, that there is some public servant who merely does his proper job by putting the finger on corruption or mismanagement and reporting it either to the GAO or to the Congress, with the result that he gets fired or demoted and the scoundrels get promoted. The worst

place for this type of activity has been the State Department, which was under Elliot Richardson. The worst case is probably the *Hemenway* case where you had a brilliant foreign service officer whose record is probably without parallel from the standpoint of academic achievement.

He was graduated near the top of his class at Annapolis and was a Rhodes Scholar. But he ran afoul of some superiors at the State Department sometime in the sixties and from that time on, he didn't move up.

Now, this was a man who had a fluency in Russian and German. He was almost bilingual in those two languages, but he also had some facility in French.

This man was being selected out in the last days of the Johnson administration. He appealed to Secretary Rogers and the matter was handled by Elliot Richardson.

Now, in this particular case there had been falsification of records, somewhat like the Watergate, perjury, condonation of perjury, a whole pattern of falsifications. I was at the White House when this thing first came up, and Mr. Hemenway came over to see me and he made a presentation of his case to me and I could see that it represented some problems.

I did not accept his self-serving declarations at that time. I merely made note of them and got in touch with Richardson's office at State.

Richardson said he would handle it. He turned it over to Jonathan Moore, his "Man Friday," who followed him to HEW and then to the Defense Department. We can expect the same standard of operation. I am sure he will follow Richardson to the Justice Department if he goes there.

In this case it was a thoroughly ineffective investigation.

Jonathan Moore paid no attention to the basic serious charges that were presented in the *Hemenway* case. He turned it over to the same scoundrels in the State Department who had initially been involved in framing Hemenway to get rid of him. So the case comes up after they had investigated it, and they said that they were all right—that they hadn't made any mistakes. Then Jonathan Moore says it is OK, and Elliot Richardson stamps approval on it.

Then, much to Mr. Richardson's disgust, Hemenway made an issue of the matter, and over a period of months forced the first public hearing on a foreign service discharge in the history of the State Department.

In the process of that hearing Hemenway established to the satisfaction of the three-man board that there was, in fact, falsification of records. There was misrepresentation and perjury in the facts against Hemenway and the unanimous board decision stated that the State Department should purge its records of all of this misinformation and false charges against Hemenway.

When the decision finally came down, Richardson had left. He was at HEW. It was a finding that, in fact, Richardson was wrong in rubberstamping the administrative decision and had not done his job thoroughly in uncovering the coverup.

It was almost identical to the kind of situation you have now in the Watergate where there is obviously a coverup and it would be Mr. Richardson's responsibility to dig into it with independence and courage.



I do not find that independence and courage present in the manner in which Richardson handled the *Hemenway* case. In fact, I gave up on the State Department and had some conversations with Laird's office. The Defense Department hired Hemenway despite the fact that the State Department was firing him.

Mr. Hemenway was employed at the Defense Department in a very responsible position at a very high level under Mr. Laurin Knutson. He was getting along fine until they decided to switch the Secretary of Defense. When Laird stepped out, it was the death knell for Hemenway's job. Richardson didn't approve of him and sent Jonathan Moore over to Defense before he got there to handle the job of firing Hemenway.

Well, Jonathan Moore fouled it up twice. He fired Hemenway and he got notice he was fired but there were technical problems. Then they gave him another notice. They thought they had it real good on that one. They fouled it up again, but they finally got Hemenway fired the third time.

In his efforts to find out what was behind the firing, Hemenway had conversations with Peter O'Donnell and with Mr. Clements, the No. 2 man in the Defense Department. He was informed that he was not being retained and couldn't be retained because he was persona non grata with Mr. Richardson.

Well, that case hardly is a case that demonstrates that Richardson is a pillar of integrity and a man who pays attention to the facts, aside from the facts that weigh in his favor.

Senator ERVIN. I have been interested in the question of executive privilege for some time. The Subcommittee on Separation of Powers conducted hearings on the subject in 1971, the record of which ran to 635 pages.

I have been trying to figure out in my own mind whether there is any basis for a power of the President to keep a matter secret, whether such a thing is necessary to efficient government. It does seem to me that it is in the public interest to have the President receiving uninhibited and full advice from an adviser and to have the adviser protected against the divulgence of the advice he has given the President because if he is going to have some fool advice headlined in the newspaper or by the broadcast media, he is going to hold back and restrain himself in giving honest advice if it appears that some others may characterize it as foolish.

So, I have come up with this formula; the President should be entitled to keep secret, confidential communications between him and his adviser, or even among his advisers which are had for the purpose of assisting the President to perform in a lawful manner some official obligation imposed upon him by the Constitution or the laws of the United States.

Under my theory, executive privilege cannot be invoked to conceal the doing of any unlawful or wrongful acts because there is nothing in the Constitution or the laws of the United States which makes it an official act of the President to commit unlawful or wrongful acts; and also the privilege cannot be invoked to cover political activities, because seeking reelection to an office does not constitute an official act of the President under the constitutional laws of the United States.

I would be glad to have your comments on those views.

Mr. MOLLENHOFF. There are problems in trying to draw any kind of a definition in this area as I am sure you are well aware of.

The basic things that you set out are, I think, the guidelines that we would all like to be able to establish.

But the difficulty in coming to grips with them is this: How do you know whether a crime has been committed or the overt act of the conversation that is relevant to a crime unless you hear the conversation?

The question in the instant case, the crucial issue is what President Nixon said to John Ehrlichman, Haldeman or Dean and what they said in reply. Aside from close examination of the testimony, there is no way to come to grips with whether he was in fact misled or whether he was in fact a participant in the coverup.

It is a fine line. The words are difficult to interpret because they can have double meanings.

If the President simply says, "We will take care of that," is that knowledge of the overt acts and the fact that it might be illegal? What did he know ahead of time?

It is necessary to know precisely what he was aware of at the time he said "take care of that."

It is very difficult to permit any executive privilege. I don't like to use the term "executive privilege." I like to think in terms that the President is entitled to a confidentiality when commonsense dictates that he should have that confidentiality. When the *prima facie* case indicates that he may or may not be involved in guilty knowledge of a crime, you have a different situation and a different responsibility to react and answer than you do when you have not developed that *prima facie* case.

Senator ERVIN. In other words, your position is that any principle in this field, any abstract principle, is very difficult to apply to a concrete set of facts, and you have to have testimony as to what the communications were in order to determine first whether they were confidential in nature, and second, whether they envisioned knowledge or complicity in the commission of some wrongful act?

Mr. MOLLENHOFF. I think that back in 1951 there was a case that seems to me to hit the right balance. It was the firing of General MacArthur by President Truman. There was a hearing before the Joint Committee of the Senate Foreign Relations Committee and the Armed Services Committee.

The question before the body was whether General Bradley would have to testify on his conversations with Mr. Truman just prior to the firing.

In fact, General Bradley did come up; he did testify; he stated what he had told the President in general. He stated when he saw the President, the period of time that he was with the President, the conclusions at the end of that period of time by the President, and the question about the conversation itself.

Now, obviously, this was not a criminal act of any kind. This was a matter of discretion with the President and it was a matter of whether the President had consulted with his top aides in this military field prior to the time he made the decision.

It turned out he had consulted with them and that he was aware of certain facts at that time, but the precise terminology used in communicating those facts was not important.



Senator ERVIN. Apart from any questions of law, is it not a sound general principle of human conduct that any individual holding any office, or holding no office, should make a full disclosure in respect of his activities where they are called into question just as a practical matter?

Mr. MOLLENHOFF. I think that is correct.

Senator ERVIN. I say that for this reason: we have a rule of evidence that if a party in litigation has evidence in his possession and fails or refuses to produce it, that the triers of fact can draw an inference that the reason he fails to produce it is because it would be unfavorable to him.

Mr. MOLLENHOFF. I think that is a right conclusion, and I think that the courts on this subject have been very reasonable.

The decision by Chief Justice Marshall back in the Burr trial is still valid. I guess it is still the law of the land. Every person has the responsibility, even the President of the United States, to come before the courts and state the information that he has that would be helpful to resolving a problem before the court, to testify truthfully and to produce such documentary evidence as is available.

In that particular instance you have the subpoena duces tecum for documents and President Jefferson did not appear but he sent some colonel down to Richmond with the documents and in that respect did comply with the decision of the court.

Senator ERVIN. I will ask you this question:

Does not an innocent person who has information in his possession, and who fails to produce that information, take a very serious gamble as to what conclusions the public may draw from his failure to produce?

Mr. MOLLENHOFF. I think that, in the case of Fitzgerald, had I failed to testify before the Civil Service Commission and had I taken an executive privilege because I was operating as a White House special counsel at that particular time, I would have put myself in the position of permitting the public to believe that I was a part of the conspiracy against Fitzgerald, rather than a very active person on behalf of Fitzgerald, as the record showed.

I have the documents there, my own testimony plus the communications I had with the President of the United States to show that I had tried to get them to get the case straightened out on the basis of its being the right thing to do.

Senator ERVIN. I was very active as a trial lawyer for many years, and I soon learned this: we have a statute in North Carolina which is similar to statutes in most States, which says an accused in a criminal case has the option of testifying in his own behalf or refraining from testifying.

I soon found out that if the defendant refrained from testifying and the jury was unable to arrive at a verdict, about the first thing a juror would say was, if that fellow is innocent, why doesn't he get on the stand and say so?

Mr. MOLLENHOFF. My experience in covering courts over a period of 20, almost 30 years now would bear that out.

I know that the jurors, regardless of the instructions, will just accept the fact that if a guy didn't testify, he didn't have much on his side.

Senator ERVIN. It is a fact that human psychology oftentimes is more powerful than human law.

I don't know whether you have completed your statement or not.

Mr. MOLLENHOFF. Well, there was one thing that I wanted to submit for the record.

It is a letter that John Hemenway has written to the Judiciary Committee relative to the Elliot Richardson nomination to which he has attached a couple of stories that I wrote.

[See "Mollenhoff Exhibit." Appendix, Volume III of these hearings, Executive Privilege, Part 6, Miscellaneous Background.]

I might say that I wrote the column on Richardson which appeared April 15 a couple of weeks prior to the time he was up for consideration or it had even been mentioned that he might be appointed Attorney General. So it was not with the idea of reflecting upon Richardson in connection with the Watergate matter that I wrote the column initially.

It is a recitation of Richardson's responsibility in connection with the *Hemenway* case and Hemenway's views relative to Richardson's qualifications or lack of the same. It is relative executive privilege simply because this is typical of the fact that you can't get answers out of the executive branch of the Government. Mr. Hemenway, in trying to get adequate explanations from Richardson, from the State Department as a civil servant on his own case, has gotten thoroughly inadequate responses. They haven't used executive privilege, but they operate on the theory that they don't have to be accountable to anyone and they will not be accountable to Congress because these are so-called internal working papers of the agencies. That is about as broad a category as it could be.

If the Congress would permit the internal working papers of any of the agencies or the executive branch to be kept away from Congress on plea of executive privilege, it would actually have the effect of making almost nothing available to you, because I think that essentially anything can be categorized as an internal working paper until such time as they want to put it out.

Senator ERVIN. I guess the Constitution of the United States was sort of a working paper until it became ratified.

Mr. MOLLENHOFF. There is one point that I would just like to make very briefly.

In defending executive privilege, there are many that will make note of the fact that Henry Kissinger should not be required to testify before the Senate Foreign Relations Committee at a time when he is involved in delicate negotiations with the Communist world.

I think that that carries a great deal of weight with many of the public, but I don't think that it is necessary to accept executive privilege to permit him to refrain from testifying. Commonsense tells us that in the time of such crucial decisions he shouldn't have to testify.

However, there is no reason why an executive privilege should cover Henry Kissinger indefinitely any more than anyone else. To view it otherwise is to say that whatever Dr. Kissinger is saying to the Chinese Communists, to Hanoi, in these little meetings they are having, is now and shall forevermore be outside of the domain of what the American people are entitled to know.



Well, that would be to give Dr. Kissinger a power of life or death over this Nation in his agreements, and though I might trust Dr. Kissinger a great deal and have admiration for some of the things that he has done, I am not willing to—and I don't think that Congress should be willing—to say that he is unaccountable and shall be unaccountable forever. If Mr. Nixon is taking that position with regard to the overall application of executive privilege, then he will be in more difficulty than he is in on Watergate.

SENATOR ERVIN. Professor Kurland, do you have any questions?

MR. KURLAND. I have only one.

Really, is not one of the functions of Congress the investigation of the Executive?

MR. MOLLENHOFF. I think it is the most important function.

MR. KURLAND. One of the problems we are faced with here is a series of bills suggesting various responses to the increased use of the executive privilege, or at least increased refusal on the part of the Executive to respond to requests from the Congress for information.

I do not take your statement to mean that there ought to be no legislation, or should I?

MR. MOLLENHOFF. I prefer no legislation. I would prefer a much more aggressive Congress.

I think if there were a dozen Sam Ervins on this side and a dozen John Mosses on the other side, that you wouldn't have so many problems, because they would come to grips with this in a manner that would be effective in putting the executive branch in its place and insisting upon records.

I think that now there is a better public understanding of executive privilege and the evil of the doctrine—thanks to the Watergate matter more than anything else.

It is hard to get the public and the editorial writers steamed up on executive privilege but having seen it dramatized in this fashion in the Watergate affair, I am sure that even editorial writers will understand it.

I say that because I view editorial writers generally as having a rather low intelligence quotient. If they understand it, then everybody is going to understand it.

They were thoroughly blind on this whole executive privilege matter through the 1950's and 1960's and I hope it was blindness—not a political blindness—during the administrations of Presidents Kennedy and Johnson.

Suddenly, they have swung over to save them embarrassment.

I will not name the editorial pages nor the editorial writers nor the columnists who have done this quick 180-degree turn.

But I think that change in atmosphere represents a great step forward.

MR. KURLAND. The essential problem is that a crisis of that sort is soon forgotten and the issue may be particularly bright at this moment.

MR. MOLLENHOFF. I don't think that Watergate is going to be forgotten.

MR. KURLAND. You have more faith than I do in our press and the public in regard to this.

Mr. MOLLENHOFF. There isn't anything like Watergate in our history. We didn't forget Teapot Dome. We may have forgotten some of the lessons of Teapot Dome, but it was still a symbol of evil and I think that Watergate will be a symbol of evil for generations to come. I think that the best we can hope for is that we gain from the Watergate experience.

Mr. KURLAND. My point is that we do have Watergate and a continued resistance on the part of the Executive to supply information to Congress, and is it possible that we can rely on something different from "commonsense"; that is, legislation that will make real the capacity of the legislative branch to obtain the necessary data for its operations?

Mr. MOLLENHOFF. I don't think there would be any objection to the Congress going on record again asserting its belief that it has a right to every document and testimony from every person who is working in the executive branch of Government as well as outside.

But there are laws on the books that at the present time should take care of that.

The Budgeting and Accounting Act of 1921 says that the Comptroller General shall have every document he wants. Yet you have executive privilege being used against production of documents.

I think it is a matter of moving forward with firm conviction and the kind of punch that Senator Ervin put into this Watergate matter. Some other chairmen have periodically had enough courage and persistence to follow through and force disclosure. You don't solve all these things with one little law that says Congress shall have everything.

It takes a followthrough that is consistent and punishment of those who withhold information improperly. I can't emphasize that too much. Those individuals in the executive branch who withhold improperly, should be put on a cross.

Mr. KURLAND. You are making a slight hyperbole in your suggestion. But you do make a point that what we are lacking is legislative sanctions that can be imposed upon those who decline information?

Mr. MOLLENHOFF. I would suggest that a subpoena power be given to the General Accounting Office to be used through the courts rather than coming back to Congress.

The fact that their power is contingent upon coming back to the Congress to get specific enforcement each time that they run into a block limits their authority to a large degree.

I think that the General Accounting Office is going to have to be given subpoena power relative to the enforcement of the election laws. One of the first things that I noticed this last year was the lack of power. All they could do was try to persuade the Committee to Reelect the President to make records available. All they had was the power of persuasion.

It wasn't a very great power but I must say that I think Sam Hughes and Elmer Staats used what power they had effectively. They would have been much more effective at coming to grips with the whole Watergate matter had they been armed with subpoena power at an earlier stage.

Mr. KURLAND. Thank you, Mr. Mollenhoff.  
Senator ERVIN. Professor Miller?



Mr. MILLER. Yes.

Mr. Mollenhoff, just a couple of questions. Am I correct; are you a lawyer?

Mr. MOLLENHOFF. Yes, I am a lawyer.

Mr. MILLER. So you are speaking with a background of legal knowledge?

Mr. MOLLENHOFF. Legal knowledge specific in depth of understanding in this particular area.

I have followed this and written extensively on executive privilege in the Bar Journal, and my book, "Washington Coverup." In essentially every one of my books I am concerned with the legal aspects as well as just a good color story.

Mr. MILLER. Then I have two questions:

One is: Are you aware of the White House guidelines issued on May 3 and 4 of this year with respect to executive privilege?

Mr. MOLLENHOFF. I have seen—I have read of them, but I must confess that I have not read them in detail and did not—is this a copy of them?

I have been trying to get ahold of a copy of them.

I called over to the White House and somehow they don't respond to my requests.

Mr. MILLER. I wonder why.

Mr. MOLLENHOFF. Quickly these days. I am having the problem of rapport with Ziegler.

Mr. MILLER. Are these the ones you asked for issued by the White House, on May 3?

Mr. MOLLENHOFF. I will take a look at them.

Mr. MILLER. I might add, Senator, while Mr. Mollenhoff is reading these, that the Washington Post said yesterday, in an article, that these were written in the White House itself, not in the Department of Justice, so they are a product of the White House staff, the lawyers there, I would assume Mr. Garment, and I have personal knowledge to know that the Post is accurate.

Senator ERVIN. We will have a panel discussion later and one question with which I am concerned—since a congressional committee is empowered by the Constitution to conduct an authorized investigation—is whether the committee or the White House prescribes rules of evidence to be followed by the congressional committee.

I am at least of the opinion that the congressional committee has the right to prescribe its own rules of evidence as to the competency of witnesses subject only to the provisions of the Constitution such as self-incrimination clauses or any other provision of the Constitution which might be applicable.

I would like to have a panel discussion on this that would help me on that question.

Mr. MILLER. I think we could discuss that later.

There is another question I would like to ask Mr. Mollenhoff as well.

The suggestion that executive privilege in this document, which I would like to introduce before Mr. Mollenhoff talks, that the Presidential papers are covered, all Presidential papers as I read this document of May 3, seems to me to be an extension of executive privilege far beyond anything that has ever been seen before.

Senator ERVIN. It indicates an opinion of the authors of that document that executive privilege applies to all officials of the President and under the exclusive personal control of the President and that he can withhold them from historians as well as congressional committees.

Mr. MILLER. One question I want to raise later is the question as to who has title to these documents. This letter I am holding is addressed to you, Senator. In it, the Director of the Administrative Office of U.S. Courts, Rowland F. Kirks, makes the statement that unpublished work papers such as any governmental or private group may acquire are always regarded as the property of that group.

I don't know of any law entitling a government group to the property of those documents.

Senator ERVIN. You are raising a question which Justice Douglas raised during the oral argument in the *Gravel* case.

He said:

Can it be said that a document of information which is executed at the executive branch of the Government at the expense of the taxpayers is the property of the particular department or agency having custody of it in the same sense that I have absolute title to my automobile?

I think it is a question which is directly involved in this matter.

Mr. MILLER. Mr. Mollenhoff, are you through reading the guidelines?

Mr. MOLLENHOFF. I am through reading these.

It is as I had surmised from what I had read about them. This would be, to me, a coverup document.

This would be an additional document to make it possible to draw the net tighter on what apparently someone in the White House feels are danger areas for the Office of the President.

Now, if Leonard—I think it is important. Did Leonard Garment do this? Do we know that for sure?

Mr. MILLER. I know for sure the Justice Department did not do it.

Mr. MOLLENHOFF. If this was done by Leonard Garment, then I would assume he would be the one with responsibility because he is now White House counsel.

It would be interesting for me to know whether he consulted with the President on this, because that would tell me whether the President was knowledgeable about what appears to be an overt act to cover up.

The thing that has amazed me through this whole matter is that instead of learning their lessons as they have gone along, they compound their problems by engaging in further coverups.

This business of presidential papers and communications, not only with the President, but among staff members and former members who may have made reference to what the President did or did not know, is an obvious effort to try to avoid Presidential responsibility, to make the President's speech the other night stand up.

Mr. MILLER. Well, it is not doing that at this moment, sir.

Have you ever seen in your newspaper or legal career any extension of executive privilege in this manner?

Mr. MOLLENHOFF. No; usually they try to—in years past they tried to cushion it. They would claim a broad, general right but then would say: We are not really using it to cover up anything; we are just using it this way this time.

In the context of the Watergate investigation, this is more devastating than it appears on its face because it demonstrates to me an intent



to cover up with malice aforethought by whoever presented this document.

I might say that I don't have greater faith in Leonard Garment than in John Dean. He was also a member of the team.

I was over there with him. I know that Garment's tendencies were not to expose the President or anyone near the President. He knew where the power was and tried not to upset it and that is why he has continued to be there.

He would have been drawing this document up under those circumstances. Of course, the whole thing is so laden with possible conflicts of interest that I don't know how they will get themselves out of this.

Mr. MILLER. Senator, I wonder if we would be in order to have this document inserted into the record?

Senator ERVIN. Yes, let the record show that a copy of the statement of the White House of May 3 and May 4 has been printed earlier in the record.<sup>1</sup>

Mr. MILLER. I would like to move onto the other points.

You have covered courts for many years. Have you ever had to cover the acts of the Judicial Conference?

Mr. MOLLENHOFF. No, I have not.

Mr. MILLER. Have you ever had any knowledge about trying to get information about working groups, for example, that produce new rules of evidence?

Mr. MOLLENHOFF. No, I haven't. I have tried to obtain some information from time to time, but that is not—has not been a major concern simply because I have been doing most of my work relative to the legislative and executive. Most of the things that I was covering in the court have not involved the administration of the court itself, but only things that come up in courts.

But there is an area of court administration where I have had some concern.

There has been corruption in the courts, and I have done a number of stories about bankruptcy rings that involve Federal court judges in Wisconsin and Indiana in the seventh circuit. In connection with trying to get a resolution, to get some action against some of those judges involved in questionable activity, I have tried to find out how to get some action from the court itself.

Chief Justice Burger has talked extensively about court reform and the need for it. I share his view completely.

There is a need for it. But these conferences that deal only with generalities don't come to grips with some of the real problems they have with some individuals who continue to assert authority as Federal court judges despite very questionable activity.

There is one instance out in Wisconsin. Robert Teehan. He was put on the bench in 1947, I think it was, but he had paid no Federal or State income tax for a period of 7 or 8 years prior to the time he went on the bench—filed no income tax returns.

He suddenly gets religion, just before he is going to be appointed, and gets involved in madly filing returns.

But he now sits in judgment on tax cases. He has had a number of tax cases in his court where there has been highly questionable settlements—in some instances, occasions of a shakedown in a tax matter, and in other cases, just soft settlements.

<sup>1</sup> See p. 276.

You see that pattern clearly and the courts are doing nothing about it.

Mr. MILLER. Let me introduce this final question: The general observation is the Judicial Conference does produce new rules of evidence, does produce Federal rules of criminal procedure, and is about to produce some new rules of bankruptcy. They do in effect legislate these new rules unless Congress stops them as they did with the new rules of evidence.

My question is this: Could you have, as a general matter, the same reaction to producing the working papers of the Judicial Conference and its group as you do the executive branch and its groups?

Mr. MOLLENHOFF. I think there is an absolute duty on the part of the Judicial Conference, when they are drawing rules, to say who introduced these rules and even what the discussions are. If they haven't kept a record of how these rules were definitely opened, then they are negligent themselves because there are instances of people on the Federal courts who are corrupt. The *Kerner* case is not the least of these.

There are a lot of others just as bad as Kerner, who are around yet.

Mr. MILLER. I am not going into the matter of corruption.

Mr. MOLLENHOFF. The people who are involved in the corruption can be the people who are influencing the decisions on evidence.

The new rules——

Mr. MILLER. All right, sir.

I think, Senator, if I might also suggest the inclusion in the record at this time the correspondence we have had with the Administrative Office of the U.S. Courts and the refusal of that office to furnish information not only to the Congress but to interested scholars who are studying this matter.

Senator ERVIN. Let the record show that correspondence will be printed in the record.

[The material referred to appears in the Appendix, Volume III of these hearings, Executive Privilege, Part 5, Confidentiality in the Judiciary.]

Mr. MOLLENHOFF. You see, I associate all of these things with the problems of corruption in the court simply because that is the area that I have been dealing with; I don't want any of these corrupt judges taking part in decisionmaking on rules that might affect their own operation, or that might protect them or some of the people that they are dealing with and conniving with.

Mr. MILLER. Nothing further.

Thank you.

Senator ERVIN. I would suggest maybe some importance might be had in drawing some ascendant rule or some statute on this point that makes it plain to the Executive that Congress asserts its power to demand information from the Executive and provides, for example, the witness must obey the subpoena and come before the committee in order to invoke the privilege not to testify.

As I said in connection with the newsman's privilege bill, I want a newsman's privilege bill written so plain and simple that even judges could understand it, and I would like to have some kind of rule that even the White House and the executive branch can understand it.

Mr. MOLLENHOFF. I want it so clear that editorial writers can understand it.



Mr. MILLER. Senator, may I make it very clear when I am talking about the Judicial Conference, it wasn't the conference of the judges. It was the Judicial Conference of the United States, which is the Chief Justices and judges from all over the country who meet periodically to appoint committees and write rules and so on.

I am not talking about individual litigant cases.

Mr. MOLLENHOFF. I understand that.

You are dealing with general rules and the administration of courts themselves. I don't think there is any justification at all for secrecy with regard to that, I mentioned the corruption only because corrupt influences on lawyers or judges can get into decisionmaking processes, and I as a reporter want to be able to pin it on them.

That is why I am afraid they are engaging in secrecy to avoid it. Senator ERVIN. Thank you very much.

I appreciate very much your contribution, and you have certainly made a good study of this whole subject of Government coverups. We have had various experience with Government coverups.

[Mr. Mollenhoff's full prepared statement follows:]

#### PREPARED STATEMENT OF CLARK R. MOLLENHOFF

#### PRESIDENT NIXON—VICTIM OF EXECUTIVE PRIVILEGE

Events of the last few weeks have demonstrated more clearly than any complicated legal study possibly could the full evil of "executive privilege" as a justification for arbitrary secrecy practices in the Executive Branch.

My personal experience in the A. Ernest Fitzgerald case demonstrated to me how such arbitrary secrecy practices could have been used by the Air Force and the Nixon White House to hide evidence of the crimes committed against an honest man.

You recall that Fitzgerald, an Air Force cost analyst, was fired by the Air Force after he testified about the billion-dollar cost overruns on the C-5A jet transport. The decision to abolish his job in a reduction in force was a subterfuge that was apparent to Senators, Congressmen and editorial writers. Yet the Air Force Secretary and his minions blandly denied it, and then put out malicious smear stories that Fitzgerald was really "a bad guy" and that he had violated security and had been involved in some vague conflict of interest.

The "smear" was for the obvious purpose of cooling any White House or Congressional enthusiasm for a depth investigation of the firing. Air Force officials apparently had full faith that the Justice Department and the Civil Service Commission would cooperate in their conspiracy to end Fitzgerald's career in government by foul or fair means.

The Air Force officials declined to testify at a Civil Service Commission hearing concerning their conversations with the White House in connection with the decision to fire Fitzgerald and claimed, in this instance key documents were made available to Fitzgerald that established the pattern of Air Force activity in the crucial period and that the President and other key White House officials had been notified of the facts relative to the firing.

All of this information on Fitzgerald's side of the case would not have been available to him if the communications with White House personnel had, in fact, been covered by an executive privilege.

More recently, the Watergate affair has demonstrated more dramatically the wide range of crimes that could go unpunished if officials of the White House are permitted to arbitrarily bar Congressional committees and the courts from testimony or documents simply because they involve White House communications with others in the Executive Branch.

In the Watergate case the evidence now shows rather clearly that executive privilege hid evidence of obstruction of justice for months while the President and the White House spokesman issued broad denials of any White House personnel participating in the burglary, the bugging or the general conspiracy.

If we are able to believe what President Nixon tells us of his lack of knowledge of the burglary, the bugging, or the cover-up, then we must assume that President Nixon was indeed the greatest victim of the executive privilege shield that

he had tried to pull around his White House. If he did not know what his aides were doing, it was because they lied to him, with false confidence in their power to use him and his good name to cover up their sordid obstruction of justice, bribery, perjury, and falsification of documents.

If the President is accurate in stating that he did not know about the cover-up, he should be appalled that his aides misled him with their lies or deceptions. Mr. Nixon should be thoroughly disgusted with the mess that this evil secrecy doctrine has created for him and led him into.

President Nixon should realize that he is the greatest victim of the sinister executive privilege claims that he and his administration have been disseminating. If John W. Dean III and his other aides had not been so confident that they would be shielded from telling the truth to Congress, or even making an appearance before a committee, they might have been more forthright at an earlier date in their communications with the President.

Now, according to the picture as presented to us by the President, some of his most trusted assistants were scheming together to keep him from learning what they had done. The fact that they believed they could avoid producing documents for Congress or the courts, and also avoid testimony under oath, would surely have made them more bold in this obstruction of justice and the multitudinous other crimes that were a part of the overall cover-up.

There is no law that sustains executive privilege and Congress should make no law that recognizes this privilege even in the limited sense. There are no Supreme Court cases that sustain the broad executive privilege claims that the Administration is asserting.

There is no logic that can sustain an executive privilege in a democracy, for to permit the President or his official family Executive Branch to have such authority to refuse to testify or produce records is to accept the fact that there is no accountability.

The Fitzgerald case demonstrates the extreme evil that executive privilege can be in hiding relevant facts from the public in an Air Force conspiracy to destroy a truthful witness.

An Air Force cost analyst, A. Ernest Fitzgerald, was discharged after he displeased his superior by testifying on the billion-dollar cost overruns on the C-5A program. Editorial pages were nearly unanimous in castigating the abolition of Fitzgerald's \$30,000-a-year job, and declared economy reasons given were but a subterfuge for malicious retaliation.

The Air Force denied it, and imposed a secrecy on its records, proceedings and conversations with the White House. The "privilege" buried evidence of a devious smear of Fitzgerald as well as other evidence that the Air Force plotted to harass and intimidate a truthful witness. Disregarding Air Force efforts to impose executive privilege, White House memoranda were made available to Fitzgerald to establish key aspects of his case. Without those internal memoranda of advice, Fitzgerald's case would have been incomplete and the Air Force would have successfully hidden its deceptions.

Recent history shows that this devious doctrine has rarely been used for anything but a cover-up for scandalous military bungling, foreign aid corruption, conflicts of interest and influence peddling. Examples include the Dixon-Yates "conflict of interest," the Adams-Goldfine affair, frauds in Laos foreign aid, the Billy Sol Estes cotton allotment frauds, the TFX warplane mismanagement and "conflicts of interest," and the White House investigation of the Watergate scandal.

Arrogant executive branch officials have even used it to bar General Accounting Office auditors from financial records in violation of the Budgeting and Accounting Act of 1921 that specifically requires that "all records" be made available to that office upon request.

Various Attorneys General, politically appointed, have ruled that executive privilege gave the Executive Branch the right to impose this arbitrary secrecy. It was the king's lawyer stating the king was right in asserting this total power to withhold evidence from Congress and the General Accounting Office.

It has been conceded that no law of Congress has granted this so-called executive privilege and no Supreme Court decision has been cited for this assertion that the President has a Constitutional right to bar testimony from any high-level or low-level official of any executive agency when he believes it to be in the national interest. Further, we are told that the executive privilege claims cover any internal working paper in the Executive Branch and that any advisory opinion can be withheld from Congress, the General Accounting Office or the pub-



lie without explanation except that the President believes it to be in the national interest.

The only authority cited for this seed of totalitarianism is a claim of some all-encompassing "inherent right" under the "separation of powers" doctrine of the Constitution.

Senator Sam Ervin, a recognized authority on the Constitution, has declared that "executive privilege is executive poppycock." He has castigated President Nixon's effort to bar all present and former White House aides from appearing on the Watergate investigation as an attempt to rob Congress of a rightful power to investigate to determine if the laws passed by Congress are being properly administered and enforced.

Raoul Berger, a senior fellow at Harvard Law School who has done extensive research on the history of the so-called precedents, has declared that executive privilege is a myth and not the "time-honored doctrine" that William P. Rogers claimed it to be when he became its leading proponent as Attorney General in the Eisenhower Administration.

Seldom has it been used as anything but a blatant cover-up for corruption, mismanagement and political double-dealing. The doctrine is devoid of decency because it creates the illusion that officials may use the great power of the White House in secret and never be held accountable for their acts.

The Watergate scandal is simply the latest manifestation of the corrupting influence of the ill-founded illusion of total power to corrupt the political processes and get by with it. The Watergate scandal and the Fitzgerald case provide sufficient examples for the public and the Congress to comprehend the mischief that can be created behind a facade of pious slogans about "a sacred separation of powers."

Where secrecy is needed to cover sensitive negotiations or raw F.B.I. files, an articulate President need only appeal to the common sense and decency of the electorate on the specific issue involved, and he should not engage in public relations gimmickry to give further support to a doctrine that could destroy all of our freedoms.

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DES MOINES REGISTER AND TRIBUNE,

February 13, 1973.

THE PRESIDENT,  
*The White House,*  
*Washington, D.C.*

DEAR MR. PRESIDENT: For almost a year now, Ronald Ziegler has been assuring me that you would see me privately. It was my desire to call to your attention aspects of the A. Ernest Fitzgerald case that I am sure had escaped your attention. I also wanted to point out some possible pitfalls in the Watergate and, in more recent months, the Gordon Rule matters. That promised meeting has failed to materialize although Mr. Ziegler continues to assure me it will take place at any time.

The Fitzgerald case has reached a crucial juncture where I must decide my course of action in a case in which my testimony might result in justice for a man who has been brutally mistreated by his government. I realize that you have been much too busy to be aware of the important details in the Fitzgerald case, but I believe they should be brought to your attention because of your concern with honesty and integrity in the governmental process.

The present crisis arises for me because of new testimony given in the public sessions of the Civil Service Commission hearing in the Fitzgerald case. This new evidence has made me aware of the enormity of the wrong that has been done to Mr. Fitzgerald, and the testimony I might give to try to right the wrong.

The testimony of Air Force Brigadier General Joseph Cappucci, head of the Office of Special Investigations (OSI) for the Air Force, has established that a special investigation file was started on Mr. Fitzgerald in mid-May of 1969 as a result of what General Cappucci characterized as "vague and nonspecific" charges that Fitzgerald had violated security and had serious conflict of interest.

General Cappucci testified that within a period of approximately three months he had investigated Fitzgerald and made a determination that the charges emanating from four still unidentified Air Force sources were without foundation.

However, to my personal knowledge top Air Force personnel continued to spread "smear" stories of a security violation problem and a conflict of interest to members of Congress and at the White House months after General Cappucci says he cleared Fitzgerald of these charges.

General Cappucci has also testified that he communicated the clearing of Fitzgerald to Air Force Secretary Robert C. Seamans, Jr., and other high military and civilian officials of the Air Force. Despite this, Air Force officials came to my office in the Executive Office Building as late as November and December, 1969, to relate that Fitzgerald was a security violator and was also involved in a conflict of interest.

Challenged to give me a written report on this matter, the Air Force officials stalled for weeks and months but never did admit that they had no case. Although I had grave doubts about the accuracy of the Air Force charges, I gave them the benefit of believing that they had arrived at erroneous conclusions without carefully analyzing the evidence and were embarrassed to admit they were wrong.

It was a shock to me to learn that they were still peddling the false charges more than three months after General Cappucci's investigation had cleared Fitzgerald.

It is now firmly established through admissions against interest by General Cappucci and Air Secretary Seamans that the Air Force has done Mr. Fitzgerald an enormous wrong. It is difficult to determine whether it is a result of gross negligence in failing to check the Air Force investigation record or whether it is the malicious conspiracy "to get Fitzgerald" that Fitzgerald's lawyers contend it is.

In either event, Mr. Fitzgerald has suffered an irreparable injury. I feel obliged to call these facts to your attention since I was your Special Counsel at the time the Air Force representatives called me to explain what they characterized as "important information" on the Fitzgerald case.

It can now be stated categorically that the "important information" intended to keep me from making further inquiry into the Fitzgerald case was merely an Air Force restatement of charges that had already been proven groundless.

I assume you will want to take direct action to correct this wrong since it is now apparent that Air Force Secretary Seamans has no intention of admitting and correcting his errors. There is no way you could have known of the shocking manner in which the Air Force mishandled the Fitzgerald case in the light of the earlier falsifications by the Air Force. Although I have had the most serious doubts about the Air Force actions for months, the secrecy the Air Force has pulled around the case made it impossible to be aware of the enormity of the crime until the recent public testimony of General Cappucci and Air Secretary Seamans.

The unconscionable Air Force cover-up of the Fitzgerald case is another argument for a maximum of open government and a minimum of secrecy in government proceedings. As you know, I disagree with your present posture on "executive privilege" and would not avail myself of it under any circumstances. It is a disservice to the President more than anyone else, because he is usually the one most in the dark about the petty and dishonest activities of his subordinates who control the flow of information to the President.

I am in good company in my views on executive privilege for it was expounded forcefully and eloquently by Richard M. Nixon who, as a Congressman and a Senator, was aggressive and impatient to expose the despoilers of democracy. I am hopeful that you will come to see that, as President, your own self interest demands the same standard. Otherwise, the President is often the last to know the problems in his own house.

Respectfully yours,

CLARK R. MOLLENHOFF.

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DES MOINES REGISTER AND TRIBUNE,  
Washington, D.C., March 5, 1973.

Mr. JOHN WESLEY DEAN III,  
The White House,  
Washington, D.C.

DEAR JOHN: I am most concerned over the fact that your assistant, David Wilson, gave the Air Force my letter to you of Feb. 28, 1973, and the attached memorandum of November 13, 1969. Both were supplied at your request and for your guidance in asking questions of the Air Force to establish the truth or falsity of Air Force representations to the White House on the A. Ernest Fitzgerald case. I thought you were as concerned as I was on the indications that the Air Force had engaged in a long-time program of activity designed to mislead the White House and to defend those individuals engaged in the initial deceptions and subsequent cover-ups.



For the moment, I am willing to accept your explanation that it was not done with your knowledge and that you are seriously concerned about the loose handling of these papers that permitted them to fall into the hands of those who may be involved in a conspiracy against Fitzgerald, and at least have interests that are adverse to his. There are circumstances under which the Air Force might use this information to erect further barriers to the White House learning the truth about the tactics used to get rid of Fitzgerald.

I operated on the theory that the White House was genuinely interested in learning the truth about the Fitzgerald matter and in taking steps to correct the injustice. My letter to the President and my subsequent cooperation with you were based upon that assumption, and on the desire to get the matter straightened out with the least possible fuss. I had assumed that your promises to me, and the current questions raised about access to documents sent to your office, would have resulted in special precautions to avoid disclosure of my letter on the Air Force.

This is to inform you that those letters are being made available to Fitzgerald's lawyers together with the information that the White House permitted them to be forwarded to the Air Force. As I see it, Fitzgerald has a greater right to this information than the Air Force since his job rights are at stake.

I am also attaching a copy of Fitzgerald's lawyer's views on what White House intervention would mean to his claims for back pay. As you can see his view is contrary to the opinions you have received from the Civil Service Commission and Air Force personnel office. It is well to remember that they have a stake in keeping the White House out of this, and the Kenneth Cook case should be sufficient reminder of the injustices that go uncorrected.

Cordially,

CLARK R. MOLLENHOFF.

NOVEMBER 13, 1969.

MEMORANDUM FOR THE FILES

Subject: Meeting with Mr. Spencer Schedler, Assistant Secretary of the Air Force, and Colonel James Pewitt, his Executive Officer

From 2:00 p.m. to 2:45 p.m., I met with Mr. Spencer Schedler, Assistant Secretary, Department of the Air Force, and Colonel James Pewitt, his Executive Officer, to discuss the problem created by the abolition of the job held by Mr. A. Ernest Fitzgerald in the reorganization of the financial management office.

Mr. Schedler assured me that the abolition of the post had nothing to do with the testimony that Mr. Fitzgerald gave last year in connection with the cost overruns on the Air Force's C5A heavy transport. He stated that Mr. Fitzgerald's work and his testimony were an important part in the much needed examination of the C5A program. He said that Mr. Fitzgerald had a number of fine qualities as a tenacious investigator of cost programs, that there were a number of reasons why the job was abolished, but it had nothing to do with Fitzgerald's testimony. He said it was unfortunate that the abolition of the job was interpreted by many as an act against Mr. Fitzgerald in connection with the testimony. He also stressed that while Mr. Fitzgerald was one of a number who had taken part in the C5 investigation, that he was not necessarily the most important figure in that matter. He noted that while Mr. Fitzgerald had many fine qualities, that there were also some problems of balance in connection with his testimony on the overruns.

He said he was certain there are other projects in the Defense Department in which Mr. Fitzgerald's talents could be used to great advantage. He stated that if there was specific requests for information on Mr. Fitzgerald's work with relation to another assignment, he would have no objection and would try to set out Mr. Fitzgerald's strengths and qualifications in a fair manner. He said he was sure that Air Force Secretary Seamans and others were of the same mind and that he believes that every effort should be made to dispel the notion that the abolition of the job represented some action against Mr. Fitzgerald in connection with the testimony he gave on the C5A. He said he will prepare as fair and factual a report on Mr. Fitzgerald and his testimony on the C5A as is possible and would try to be fully cooperative, seeing that Mr. Fitzgerald finds a position in the Department of Defense that will utilize his particular talents.

CLARK R. MOLLENHOFF.

Senator ERVIN. Professor Dorsen, why don't you come up and sit with us.

I would suggest you initiate the manner of discussion.

Mr. KURLAND. I think the important thing is that we are not here to discuss the problem of Watergate. The problem of executive privilege and Government secrecy is a longstanding one and one which the Subcommittee on Separation of Powers has been concerned with at least since its inception.

I present the problems of what form of legislation, or what rule should be composed by this committee, and then the Senate, and then I should hope by the Congress of the United States. I think that this panel ought to address the question of how it can frame a rule, what the limits of the demands on the executive might be, if any, and perhaps most important, who is to make a determination as to when those limits have been reached.

Professor Dorsen, since you have prepared a statement perhaps you could start a discussion of this subject.

**PANEL CONSISTING OF PROF. PHILIP B. KURLAND, UNIVERSITY OF CHICAGO LAW SCHOOL; PROF. ARTHUR S. MILLER, GEORGE WASHINGTON UNIVERSITY, NATIONAL LAW CENTER; AND PROF. NORMAN DORSEN, NEW YORK UNIVERSITY LAW SCHOOL, GENERAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION**

Mr. DORSEN. I am a professor of law at New York University, and also general counsel of the American Civil Liberties Union. I have prepared my statement with John Shattuck, a staff counsel of the ACLU. Our views are under consideration by the ACLU but have not been officially adopted.

The larger statement which I will introduce into the record is entitled "Executive Privilege, the Congress and the Courts," and consists of two lectures I delivered at Ohio State Law School about 2 weeks ago.

[See Appendix, Volume III of these hearings, Executive Privilege, Part 1, Law Review Articles and Statements of Legal Scholars.]

The short one is a summary of that.

[The text of the summary is printed after the panel discussion, beginning on page 414.]

What I would like to do is summarize the summary very briefly. In the summary on pages 4 to 13, there is a statement of reasons why we believe it is untenable for the executive branch to claim that it has a discretionary privilege to withhold information from the Congress.

We don't think that is supported by history; we don't think it is supported by judicial decisions; and we don't think it is supported by the separation of powers concept in the Constitution.

That has three parts to separation of powers.

I will not repeat what we have in our papers, but the power of Congress to investigate is an extraordinarily broad and important aspect of it, and should not be thwarted except for the most compelling of reasons.

While there is an executive power to faithfully execute the laws, I will borrow a statement from the chairman of this committee, when he said a few weeks ago, that power to execute the laws does not imply capital punishment. Specifically, there is no basis to conclude that because the President can execute the laws does not mean he can withhold information.



Finally, our position is that if there is an ultimately unnegotiable conflict between the President and the Congress, neither the President nor the Congress should be the part of the Government that makes a final decision. The courts should make the final decision, and we give some reasons for that in our paper.

Beginning on the bottom of page 18 of the summary, we have tried to set out, I think more specifically than anyone else has had the temerity to do, some precise rules that should govern executive privilege, and we have laid them out in a form that could, if the Senate and the House were so minded, be adapted to legislation.

Now, let me just say one other thing in these introductory remarks: There are some people who take the position that no information whatsoever can be withheld by the President from the Congress, that there is no such thing as an executive privilege. We don't take that view. We think there is a highly limited privilege, but one that should nevertheless be protected.

Our reasons for thinking that there should be a privilege are two-fold: First, we think that anybody, whether the Congress, the courts, or the Executive could not function properly if mere recommendations of an informal kind and conversations of an informal kind were to be scrutinized and cross-examined in a public inquiry.

We think that everybody, as we make clear in our recommendations, should be held responsible for decisions he or she has made, for any decisions that he or she has personally implemented, and for facts that he or she has acquired in the course of professional activity for Government.

But we do not think mere recommendations should be subject to cross-examination, because we think it would defeat the free exchange of views within the executive branch.

On the other hand, when you are dealing with wrongdoing, when you are dealing with conspiracy, you are dealing with a wholly different issue, and we try to explain why a privilege should not exist in these circumstances.

There is a second reason to protect the advice of one official to another. It is on page 17 of our summary—essentially a recognition of personal vulnerability.

Specifically, lower ranking people can be hurt badly if they have to justify publicly their advice to superiors. We think that the people who are responsible in the executive branch for making decisions and for implementing policy should be required to come before the congressional committees and answer without qualification. But lower echelon people who are merely making recommendations should not be subjected to that. Congress can get what information it needs by cross-examining responsible officials.

I have only outlined our position. When you look at it, you will see that we do recognize, as I have said, an extremely narrow area where privilege can be claimed, but it is microscopic compared to the broad claims that the President and his advisers are now asserting.

Mr. KURLAND. Arthur, do you want to add anything?

Mr. MILLER. I haven't studied it on paper, but I would add that I think the problem is broader than executive privilege.

The problem is with that of secrecy of Government and includes all branches of Government. I think it is true that Congress itself at times has been involved.

I think also, as we mentioned a moment ago, the courts and particularly the Judicial Conference and their activities have been at fault.

I think added to that, Senator, is this compilation which the staff of your Subcommittee on Separation of Powers has drawn up to show the many instances of refusal of information by the Executive for reasons other than the executive privilege which goes beyond that and which I think is a part of this larger picture.

Executive privilege itself is invoked only a very few times. The problem is much broader than that and there are many reasons for doing it. Sometimes it is a flat denial and saying it is inappropriate for disclosure, no authority to release internal working documents, prejudice our relations, verbal refusals, and so forth. That is the general matter, gentlemen.

Specifically on the matter of executive privilege, I would tend to agree that it should be kept to a narrow point. I don't know how you can determine whether it is an executive communication unless someone takes a look at it, and who that someone is, is the big question at the moment.

Senator ERVIN. In other words, you see executive privilege as just one aspect of the general subject of the secrecy in Government?

Mr. MILLER. Secrecy throughout the many parts of American life.

Corporations are notoriously secret, for that matter. We know less about, for example, the big multcorporations than we do about most Government agencies, and yet they are probably as important to us as Government agencies.

So I think secrecy is a real problem.

Mr. KURLAND. If we change the word "secrecy" to the word "privacy," we come down to a different conclusion. Personally, I put a great value on the privilege of privacy.

Mr. MILLER. I don't think words make a difference, Phil. I think you can put any label on you want, still the withholding of information that people are entitled to——

Mr. KURLAND. There are some who carry those doctrines.

Mr. DORSEN. Next week, Friday and Saturday, a conference will take place at New York University Law School on the secrecy in Government that goes across the Government, legislative secrecy and local government and a wide range of other areas. It will be held for 2 full days, and we have a very distinguished group of people, former Senators Goodell and Gore, Walter Cronkite, Anthony Lewis, and many other people who will speak on the problem of executive privilege.

Mr. KURLAND. My point, however, is that you cannot solve your problem by saying you want to abolish secrecy or protect privacy.

We have here a very definite legislative obligation to define what it is that the executive branch wants to expand to other branches, what is going to be prohibited from public scrutiny, or more particularly, the scrutiny of the legislature.

Senator ERVIN. I will have to go and vote, and I expect I will be detained in order to bring up the impoundment bill.

Does your statement go into detail on the question of wrongdoing?

Mr. DORSEN. Yes, it deals with that problem. Wrongdoing is specifically dealt with in my longer statement.

Senator ERVIN. I will need a copy of your statement for the record.

Mr. DORSEN. I will put it right into the record.



Senator ERVIN. You gentlemen continue. I have to go. I don't believe I will be able to come back because the impoundment bill is the next order of business.

It was nice to see you again.

Mr. DORSEN. Thanks very much, Senator. It is a pleasure.

Mr. EDMISTEN. Why don't you continue?

Mr. KURLAND. I was suggesting the problem is one of defining what the privilege is.

The second question is who is going to determine when it is properly invoked? I think I have some conflict with Mr. Dorsen about it because I do not think the courts are the proper body for that purpose here: therefore, the third question is the question of what sanctions can be imposed in the event of failure to comply with an order of that body that is properly authorized to issue that order.

As I say, perhaps we ought to take this up in the context of the Presidential—White House statement—I take it we cannot ascribe it to the President—of May 3 and May 4, 1973.

First, in terms of the definition of the privilege, the proposition issued by the White House is that the privilege may be invoked: but it starts off with a proposition, and then it is followed by a contradiction of that proposition.

It starts off with the proposition, the President desires invocation of executive privilege be held to a minimum.

I think we have all had an opportunity to read this document.

It seems quite clear to all of us—it seems clear to me that it will be clear to all of us—that the proposition as stated here is much broader than any concept of executive privilege that has been stated in the past.

On the other hand, I think it is important to note that what the White House is talking about here is not merely the assertion of executive privilege before a congressional body, but the assertion of an executive privilege before a grand jury.

The machinery for asserting the privilege before a grand jury is much more complex and difficult, it seems to me, than the machinery for asserting it before a congressional committee.

Norman, would you like to talk to that?

Mr. DORSEN. Well, the most obvious problem of these rules in paragraph 1 is the Presidential papers.

The second related problem is that conversations among themselves is left very vague.

There is no attempt to distinguish here between advice on the one hand and decisions, implementation, facts on the other.

The idea of having papers completely insulated from congressional inquiry, as you have said, Phil, goes well beyond anything that I would think is appropriate, and that has ever been recognized before.

Mr. KURLAND. Isn't it true that part of the expansion is contained in the second paragraph, which suggests that the disclosure of classified information is also—whatever the privilege is he is talking about would cover classified information.

As I understand the statutes, Mr. Counsel, classification does not exclude congressional action. Is that right?

Mr. EDMISTEN. That is true, but it is still on the basis of what they think Congress ought to have.

Mr. KURLAND. You mean there is discretion in the executive?

Mr. EDMISTEN. There certainly is.

Mr. KURLAND. In order to draw rules governing this area, we would have to go as far as Mr. Miller suggests, and deal with matters beyond executive privilege.

Mr. EDMISTEN. I think the question, Professor Kurland, is who is going to be in the driver's seat on this business?

As Senator Ervin asked, who makes these determinations?

I disagree that you work things out on a general basis. That has never worked.

You have to have external standards that guide the actions of mankind, and that is in the form of law.

At least, Senator Ervin's resolution, Senate Joint Resolution 72, looks toward making a Senate rule.

It says, look, if you people want to deal with us, you are going to have to follow our rules in doing so.

Well, I don't buy this business about let us all come to reason together.

The executive branch of Government has almost reasoned the Congress right out of existence.

Mr. KURLAND. You don't mean that. This is not the reason they are relying on.

Mr. MILLER. What you are suggesting is they are interpreting a law that is fairly clear for lawyers to interpret, any way they want to.

Mr. KURLAND. We don't have a law that is clear.

Mr. EDMISTEN. I don't recall a law in any case of so-called executive privilege.

Mr. MILLER. No, not a law.

Mr. KURLAND. There are propositions that have been offered by Mr. Dorsen, modifications that he gave to this committee in an earlier hearing, and I think they are an improvement. Who determines whether the privilege has been properly invoked? I think one of the difficulties the White House memorandum has made clear is the grouping of the congressional committees along with the grand jury as if it were but a single privilege involved here.

As far as the courts have been concerned in the past, as I understand it, when the Government has in litigation or in terms of criminal proceedings asserted that they would not produce documents which were appropriate for production, the question of sanction was one left to the judiciary.

No question has been raised, I take it, that the court can't enter judgment against the United States for failing to provide documents in the particular situation with which we are concerned or which is pervasive in Washington at this moment.

However, you will run into a difficulty there in that the question is how do you get the Government to produce that kind of information which is necessary to prosecute officials or former officials of the Government?

I expect a ruling by the court dismissing criminal proceedings is not likely to be the most productive method of securing the access to these documents.

But I would emphasize that the problems that the courts may have are different from the problems that a congressional committee would have.



The question I would like to put to you gentlemen is, how can the committee make a determination as to whether the privilege has been properly invoked, and if it decides that it has not been properly invoked, what sanctions are available or should be made available to Congress to secure the necessary data?

Mr. DORSEN. If you are asking for a document, you are actually asking for testimony. How can a committee decide it really should have the testimony until it sees the entire document; is that the question?

Mr. KURLAND. I am working on the assumption that there is not going to be a blanket proposition that the Congress has access to any thing it wants, that there is some area of what Mr. Miller would call secrecy, and what I might call privacy.

The question is whether it falls in that area. It is the problem of confidential communications up and down the line.

Mr. DORSEN. One of the points I was going to make is that this is not a problem unique to this area.

Congress, assuming it knows about a document, would ask for the document. Presumably, the Executive would say we will not give you the document.

If my proposals were accepted, the Senate or the House committee would say, well, you can keep confidential and private those parts of the document that relate solely to advice, but in terms of decisions, in terms of implementation, in terms of facts, you don't have a right to do that.

If the Executive either refused altogether to make a document available or refused to give parts to the Senate or the House committee, the committee would then have to make a determination whether or not it wanted to press for the information.

At that point, if the President or his counsel refuse to make the information available, the courts should become a factor.

There are two ways of handling this: One is the political sanctions. We will not vote for the next nominee. We will not give you the money you want for a dam. We will make life miserable. Those are all things that can be done at the present time.

When one goes beyond that, I sketch out a way in which the courts could be involved in terms of case and controversy, standing and appropriate sanctions.

Let me say that this may be the worst possible way of going about it except for all the other ways. There is no way you can solve this problem by providing the Legislature with complete authority or the President with complete authority.

So what I have tried to do with John Shattuck is sketch out a way in which, if the normal processes of negotiation and pressure failed, you can bring a lawsuit and get an independent body to make the decisions.

At this point, one might ask what is the guarantee the President will make the document available to the courts?

One aspect of the question has to do with just plain good faith on the part of the President—similar to the case when an antitrust defendant is requested to produce documents related to an alleged restraint of trade, when a defendant in an SEC action is asked to bring documents relating to the stock market, it is possible that key documents will be destroyed and not made available. That is also possible in this situation.

But I don't see how one can work on the assumption that that will happen, although it may happen in some situations, given human nature. When a known document is identified, well, that document has to be made available to the court because they can't avoid making it available to the court.

Mr. KURLAND. They could say "No."

Mr. DORSEN. That is the second part of the problem—where the muscle or the power is.

The Supreme Court has spoken about this in the Adam Clayton Powell case. Mr. Powell sued to get back pay when he was improperly denied his seat in the House. The Supreme Court decided adversely to the House of Representatives.

The question arose, how are we going to get the House of Representatives to comply with order?

The Court said, in a footnote, perhaps with tongue in cheek, perhaps with naivete, that "It is an inadmissible objection to action which might be taken in regard to this determination."

Now, we know that it is possible that the President would say, or the Attorney General would say under instructions of the President, we will not comply. I just do not believe that is the way the Government will operate.

Mr. KURLAND. It is true in most instances. In most instances you will not get a judicial resolution of the problem.

We are in a new era, and there are certain matters which are not that kind of informational document.

Let's assume the Watergate investigations were controlled by your rules and the Executive rejected supplying you the information, and you went to court. The judge said, "Now, Mr. President, you have to produce these documents," assuming the court will take the case. I can't imagine a President under similar circumstances rejecting it even as a judicial matter. It is unthinkable to me.

Mr. DORSEN. I agree, it is not unthinkable. I just don't think it would happen.

I think the President would be risking an extraordinary confrontation after the Supreme Court has issued a mandate explicitly requiring the President to make information available to the Congress.

If I were the Commander in Chief of the armed services of the United States, and was responsible for law enforcement in the United States, I would think a long time before telling the Supreme Court I will not comply. But it is admittedly possible.

Mr. KURLAND. Let's assume that what you are suggesting is an appropriate resolution of an impassable and impossible conflict between the legislative and the executive branch. Would it not be necessary under those circumstances to put this issue directly into the Supreme Court of the United States?

Mr. DORSEN. Not the lower courts.

Mr. KURLAND. If what you are relying on is the obligations of the President to abide by the highest court of the land, until that is appealed, and the process is completed, he is not likely to do so, and it might be better to eliminate appellate steps.

Mr. DORSEN. A very interesting suggestion. It hadn't occurred to me.

Mr. MILLER. It would take an amendment, wouldn't it, Phil?



Mr. KURLAND. No.

Mr. MILLER. To enlarge it?

Mr. KURLAND. No: so long as the case is in controversy.

Mr. DORSEN. *Marbury v. Madison*.

Mr. MILLER. You would have to get over that.

Well, I would suggest there is one case, where the President did defy the Chief Justice of the United States, that is in the case of Lieutenant Merryman.

Chief Justice Taney said turn him loose, and Lincoln said, "No, I'm not going to do it."

That is in the midst of a wartime situation.

I would like to raise a further question. We are dealing with two levels of questions, a mass of low visibility type of things, a routine refusal to get information of one type or another. There are at least 160 examples in the last several years, most of which are not justified by executive privilege.

I think some sort of a way perhaps of getting a new institution with respect to a general type of thing where people can go, perhaps to the General Accounting Office of Congress, or individuals in the country who want information from Government can get an ombudsman type of thing and keep it out of the courts, you don't clutter up the courts.

Then there are those rare instances, I hope rare, of high visibility problems such as involved now in the Watergate situation. I would agree that that requires the choice of existing institutions, and I would agree with Phil's idea of immediate action by the Supreme Court, an immediate decision by the Supreme Court in an expedited fashion.

Mr. EDMISTEN. I think all these controversies by the Congress and the Executive would have their resolution a great deal quicker if we did let the Supreme Court decide rather than going 2 or 3 years with controversies about pocket veto, executive privilege, or treaty-making power, issuance of making law.

Mr. MILLER. The question concerns individuals in this country as well as Members of Congress and the probable effects on people who might be the recipients of Government grants.

Mr. EDMISTEN. I don't think we ought to wait for years to get it, Arthur.

Mr. MILLER. I think even the Chief Justice agrees with that. I don't think anyone agrees with the problem of delay in courts.

The problem is expediting the decision. Whether you want to make the trial court effect these dispositions—I do see it would be possible even as they did a few years ago in the Wyncott Chemicals case. Even with jurisdiction, the courts can still refuse to exercise it in their own good judgment.

There is no way to force a court to make a decision that I know of.

Mr. KURLAND. Let me come back and say that I am not endorsing the idea that the judiciary should resolve a question between Congress and the Executive. I think either body finding itself in the middle under those circumstances might come out on top, but more likely would be cut asunder.

The appointment of Justices with the notion—remember that the President and the Senate have a role in the notion that these Justices are going to be people who resolve direct conflicts of this nature—

there is going to be a perversion of the appointment process, I am afraid.

But there are those who have more faith in the Judiciary than I do, and maybe for the same reason that Professor Dorsen suggested in support of his plan. It is not that it is a good plan, it is just that it is the best.

Mr. DORSEN. I might add it would be an extraordinary occasion for this to happen. One side effect that might be beneficial would flow from the mere fact this remedy was lurking in the background: it would induce the parties to resolve their differences more expeditiously and amicably. When you know you will be brought into compulsory arbitration, you tend to settle your grievances more quickly.

Mr. KURLAND. Doesn't that suggest an alternative to the use of the Judiciary?

Mr. DORSEN. What is it?

Mr. KURLAND. Permanent arbitration, representatives of the executive branch, representatives of the Legislature, with a chairman presiding over it.

Let us keep the existing Judiciary out in the middle.

Mr. DORSEN. They would lack the prestige, I think, of the courts.

Mr. KURLAND. Depending on who they were. These days, there are a lot of ex-judges who would serve.

I think our primary idea is not an enforcement agency, but it may prove to be that that will be the hardest question to resolve.

The first question remains, and I think that has not been solved except in terms of Mr. Dorsen's paper, the definition of the privilege.

I think until that time, until we have a definition, we cannot really say who it is that is violating the privilege by refusing to produce data.

Does the absence of a definition mean that there is no privilege or that it is totally discretionary with the President asserting the privilege?

Mr. MILLER. It depends on whom you talk to.

Mr. KURLAND. I am talking to you.

Mr. MILLER. Let me return by asking a question.

Senator Ervin asked a moment ago: Is your view of executive privilege a very limited view? We might address ourselves to Senator Ervin's definition and ask ourselves what comments we have on that.

Mr. KURLAND. Mr. Edmisten, do you have a written definition?

Mr. EDMISTEN. It goes something like this: The President has a right to have confidential and secret advice and conversations between himself and his aides and has a right to have secret conversations between aides when those conversations relate to the President's carrying out a statutory or constitutional function of the President.

So I suppose the real question is what is a statutory or Constitutional function of the President.

Mr. KURLAND. I assume by that he is excluding non-Governmental matters and those matters which fall outside of the function because they are criminal?

Mr. EDMISTEN. Yes.

Mr. MILLER. It also goes to the content of communications, as suggested before.

The critical question here is the content of communication and who is to make the judgment on that.



Someone has to look at that communication, and if you say the President has the final say, then you are giving him the power to judge his own office and actions.

If you say the Congress has it——

Mr. KURLAND. I would like it in writing.

You say who is to make a determination, if you have a document, then it is easy to say that so-and-so shall look at the document and come up with an answer.

If you have a witness who is testifying as to what it was he said, then you have a different kind of factfinding.

Mr. MILLER. Didn't the Court in the Patsy Mink case say Congress can cure these matters and the problem was the statute itself, and Congress has the power of hearing defects in the Freedom of Information Act.

Mr. DORSEN. Let me ask you a question, Phil:

One view of the matter would limit the privilege that I call the advice privilege to people at the Presidential aide level as distinguished from people who are advising cabinet or subcabinet members, or even lesser officials.

Now, my own view is that if there is such a thing as an advice privilege, I don't see why it shouldn't apply down at the lower levels of the executive branch in the same way as it applies to advisers to the President.

Lower echelon people are more vulnerable than Presidential aides are. They are performing a function within the executive branch, and the legislative can get what it needs by interrogating responsible officials about functions, decisions, implementation of decisions, and facts.

Mr. MILLER. I don't think that is a fact, Norman.

I think that the Secretary very often says, I don't know, I will look it up. He has to go back and ask somebody.

Very often, you see congressional hearings with the witness saying, I don't have any personal knowledge of this.

Mr. KURLAND. What we are talking about in terms of privilege is not a privilege that surrounds the Executive Office staff.

Obviously, when the Undersecretary of State communicates a recommendation to the Secretary of State that falls within the privilege, we will assume.

Mr. EDMISTEN. Senator Ervin doesn't assume that.

Mr. KURLAND. We assume.

Mr. DORSEN. That is questionable.

Mr. KURLAND. I assume throughout that is the case.

I don't think you will find any testimony except that of one witness, that expresses a belief that there is any such person in the executive branch who is entitled to protection. Except for that witness, you will discover we are talking about communications up and down the line.

I think in one way the White House has started a rabbit, and we have been chasing it, and we ought to avoid it.

It was the White House that came up with the suggestion that the question of privilege depends upon the location of the Government official, and if he is called a Cabinet officer, then the privilege is not there, or it was suggested that it is not there.

If he is called a White House staff officer, it is there.

What happens with those people who carry both titles, I expect, is not quite clear, or I don't know how the White House feels about it.

To that degree, I think we should be indebted to the recent Attorney General. I guess he is still Attorney General, Mr. Kleindienst, because the one thing he made clear in his assertion of the executive privilege was that it was not limited to and not based upon the location of the Government official on the White House staff.

I should personally be dismayed if we think of the executive privilege in terms of the location of the executive personnel as really a geographic location of the executive personnel rather than in terms of the function that is being performed and the content of communications.

Mr. EDMISTEN. This survey will certainly back you up on that—these 160 firm refusals to provide information or testimony or testify, the bulk of them from the State Department.

I think you have to face up to the fact that the executive branch of Government has some notion of privileged communications.

What I have been fussing about really is this: That the Congress is always reacting to something they say down there about executive privilege, and I am saying that when the Congress in its investigative role and oversight role wants some information, it should set the ground rules.

Mr. KURLAND. I have no objection about that to the extent you are excluding access to communications, it is not merely confidential communications of those on the White House staff.

As to the extent they have the privilege—let me put it differently: They do not have the privilege because of their location.

The fact that they are members of the White House staff or former members of the White House staff does not give them an opportunity to say, I will refuse to disclose any information either to the Congress or to a judicial official.

It is not the place in the Government but the content of the communication that is important to be protected.

Mr. EDMISTEN. I was speaking only in context of the Watergate investigation.

Mr. MILLER. Let me ask this question: If you don't limit it to the White House itself, and its immediate locale, let's say the Executive Offices of the Presidency, the several hundred people who work there, then what is the cutoff point?

Don't you get to Mr. Kleindienst's point, the Attorney General's point, that covers all 3 million executive positions?

Mr. KURLAND. That doesn't shock me.

Mr. EDMISTEN. He says it does if the President says it does.

Mr. KURLAND. The question is, "Is it a confidential communication of the type that is privileged?" And if it is, I don't care if it is a GS-1 or GS-16 employee.

Mr. MILLER. You have got a really tough definitional problem, then. You have got to know what it is you are going to have privileged, or you are going to have the whole damned curtain dropped. It will drop flat. There will be a big paper curtain between Congress and the executive branch.

Mr. KURLAND. When did the notion that the privilege you are talking about was assignable only to those on the White House staff come into existence? When?



Mr. MILLER. The notion of executive privilege, to my knowledge, came into being 20 years ago in the Eisenhower administration. They invented the term.

Mr. KURLAND. You know better than that.

Mr. MILLER. They invented the term "executive privilege," about 20 years ago.

Mr. KURLAND. It goes back a long way in our history that there is the notion there are certain things in our executive branch that cannot be compelled by the legislative branch.

One of your problems is you are assuming the only place laws are made are in courts.

Mr. MILLER. That is not a problem. That is a problem of the courts.

Mr. KURLAND. The fact that a case is not decided there does not mean a case is true or not true.

The difficulty that we have here is not, as I say, the question of who shall have the power to assert the privilege, but what it is we think is properly privileged; and the function of the privilege, to the extent there is one, is to say you cannot carry on the executive branch of the Government unless there is a confidentiality in certain kinds of communications.

I know Mr. Miller differs, but most of us would say a Judicial Conference to decide how judges would go on each case is entitled to confidentiality.

We suggest that certain communications between lawyers and clients are entitled to confidentiality.

We even say certain communications between husbands and wives are entitled to confidentiality.

Mr. MILLER. The laws say that. The law doesn't say anything about executive privilege; it doesn't say anything about Chief Justice Burger with confidentiality of proceedings.

The law says nothing.

Mr. KURLAND. The question is not what the law says, but what kind of law Congress should write under these circumstances.

It is quite true there is no statute on the subject. If there were, perhaps our problem would not be existent at the moment.

The problem that the committee is charged with—and I am talking about the Separation of Powers Subcommittee and not the Special Committee on Watergate or any subcommittee of the Government Operations Committee—we are charged with the problem of drafting legislation that is appropriate to accomplish what we think are the ends of protecting communications, certain kinds of communications, and being certain we do not draw that line too narrow as to what Congress should have access to.

Mr. DORSEN. Specific rules are what I have tried to provide. I don't know if they will work or how you will react to them.

But to go back to the question you asked before, and that has never been answered:

You inquired, we don't have a statute now. What does that mean regarding the current status of the privilege?

Is it discretionary?

That question points up the line of thought which led me ultimately to go to the courts for resolution because Mr. Kleindienst said the absence of a statute means the President can decide any way he wants; I reject this for all kinds of reasons.

Mr. KURLAND. I am in agreement with you on that part of your statement.

Mr. DORSEN. If it isn't the courts, then it has to be the Congress. I don't think the Congress should be the final judge. I think there is a very powerful argument in favor of legislative access to information, but it is not the only value that we are dealing with here; we also have what you call privacy. The President should not be able to be the final determinant of his rights and duties. Nor should the Legislature be the final determinant of its powers vis-a-vis the Executive.

Mr. KURLAND. There is one part where it says these gaps should be filled, the "necessary and proper" clause.

Mr. DORSEN. That is a constitutional——

Mr. KURLAND. No. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof."

Mr. DORSEN. The investigative power is an implied power itself. Are you saying that any necessary and proper clause, appended to the investigative power, gives the Congress the right to make a final decision on this issue?

Mr. KURLAND. I am saying in terms of whether the President should have that power.

Mr. DORSEN. I say he should not.

I agree with that. We probably all agree on it. The question is whether the Congress can be the ultimate decider as the matter stands without a statute.

Mr. KURLAND. In the absence of a statute it is not Congress who will be the decider or the President.

What you are left with is open warfare, and the person who has at any given moment the power will prevail.

I agree with you that is a very poor way of operating the Government.

Mr. DORSEN. I agree completely, and I want to make one further point: 9 times out of 10, it is the President who will win that bout, since possession is 99 percent of the law here as elsewhere.

Mr. KURLAND. Until recent days, he had greater control over public opinion.

Mr. MILLER. Let me put a very broad question: Weren't we saying there are no institutions adaptable to these critical problems of privilege and these extraordinary matters that our country is now faced with?

We are dealing in these privilege questions with, again I would say, two levels of inquiry:

The ordinary level of inquiry, which is a rather routine matter, but I don't see any institution in our Government—I would say the courts are ill adapted, but probably the best adapted to deal with these matters.

If that be so, this is the question: Isn't the Constitution itself faulty?

Mr. KURLAND. There are a large number of gaps in the Constitution, certainly the three of us should know, because we make our living on the basis of those gaps.

Again, let's go back two steps: I think what we have is: If the issue comes up, can the privilege be asserted before the grand jury?



It is going to be decided and decided by the judge who is in charge of the grand jury.

I think if the question comes up whether the privilege can be asserted before the committee, it will be decided, and it will be decided by the person on the committee, the decision first being made by the grand jury or by the committee with regard to hearing.

The question then arises, what happens when the executive says, you have made your decision, now enforce it.

Mr. Dorsen is quite clear, that as to the judiciary, the executive branch is not as likely to take that attitude—and I would agree with that—as it is with regards to a committee.

I expect under both circumstances under existing law, without any change being made, the question will be resolved by the judiciary, because I assume that the committee, like the court, in the event of refusal to answer, will seek a contempt citation and that question of propriety of the contempt citation will rest in the lap of the judiciary for resolution.

So I suggest the proposal of Mr. Dorsen is only a different method of getting it there, is creating a new participation on the part of the judiciary.

MR. MILLER. But you still have the ultimate question that is not solved, and it seems to me what you raised originally, and that is how these judgments are to be made, standards, criteria, and so forth.

Unless Congress does legislate, and I think we are in agreement Congress could legislate under article I, section 8 powers——

MR. DORSEN. That point suggests another angle?

You may recall Justice Jackson's illuminating opinion in the Steel Seizure case in which he divides inherent power into three parts, one where Congress has not spoken, one where it is spoken consistently with the proposed executive action, and one inconsistently.

Congress has spoken informally on executive privilege. If it did pass a statute defining and limiting the privilege, it would be adding its weight to the court's constitutional weight in a way that would put maximum pressure on the President.

MR. KURLAND. I agree with that.

MR. MILLER. The matter, of course, of how to get guidelines, one technical matter is whether or not Congress should have a statute or whether it should be by way of resolution not subject to the Presidential veto might be a matter of interest, too.

MR. KURLAND. Quite clearly, if Congress is ready to rely on the judiciary for enforcement, then all that it has to do is make rules governing its own proceedings and have contempt citations pursuant to those rules, and that would solve the problem about submitting such a statute to the President for his approval or disapproval.

MR. MILLER. Let me make sure I understand you, Phil. Are you in favor of some sort of statute or not?

MR. KURLAND. Yes, I am.

MR. MILLER. Recognizing the difficult problems of draftsmanship, the really tough questions to be faced, we can agree on the general proposition, but it will be an extraordinarily difficult thing to resolve.

MR. KURLAND. That is right.

When I say I am in favor of a statute, I don't mean a statute as opposed to a rule.

Mr. Chairman, I don't know that this illustrious group that remains here has any further contribution to make.

Mr. EDMISTEN. I might say this: that long after the Watergate is gone, this will continue, and depending on who is in the White House, depending on what their notion is, will escalate or deescalate, and the Congress will not be fooled by any olive branches they may offer now.

[The prepared summary statement of Prof. Norman Dorsen follows:]

#### AMERICAN CIVIL LIBERTIES UNION

#### MEMORANDUM OF PROFESSOR NORMAN DORSEN SUMMARIZING "EXECUTIVE PRIVILEGE, THE CONGRESS AND THE COURTS"

(By Norman Dorsen and John Shattuck)

(Official adoption of this policy by the ACLU is under active consideration)

#### *I. Introduction*

The doctrine of executive privilege has proliferated over the decades very much as executive power itself has grown. The origins of the doctrine were modest, asserted by early Presidents rarely, in narrow circumstances, and often under a formulation which implied that the Executive could withhold information only with the express consent of Congress.

Modern presidential government, on the other hand, is symbolized by the frequency with which information is withheld from Congress at the sole discretion of the Executive. The Library of Congress reported this year that executive privilege has been asserted 49 times since 1952, including 19 times by the Nixon Administration alone.

Executive privilege is a vital pressure point in the struggle between Congress and the President because it is often used to cut off congressional inquiry into the very issues over which Congress and the President are most sharply divided. By withholding crucial information or witnesses, modern Presidents have discovered that they can exercise an informal veto over attempts by Congress to act in certain areas, particularly foreign affairs.

#### *II. The claim of a discretionary executive privilege to withhold information from Congress*

Former Attorney General Richard Kleindienst, speaking for the Nixon administration, recently asserted that Congress had no power to order an employee of the executive branch to appear and testify without the President's express consent. It is important to distinguish several strands in his testimony. First, its breadth: the Attorney General claimed that *all* employees of the federal government could be totally insulated from Congress at the order of the President. Second, he did not spell out in any detail the constitutional or other legal basis for this power, but merely stated that it was inherent in the executive branch. Third, the Attorney General asserted that the President's judgment on whether to produce documents or witnesses for Congress was final, and that neither the Congress nor the courts had the constitutional authority to interfere.

The subject matters that have been included in the executive privilege as it has been broadly asserted during the last two decades have not varied much since the Eisenhower Administration. Speaking on behalf of that administration in 1957, Attorney General William Rogers identified at least five categories of information privileged from disclosure to Congress:

1. military and diplomatic secrets and foreign affairs;
2. information made confidential by statute;
3. investigations relating to pending legislation, and investigative files and reports;
4. information relating to internal government affairs privileged from disclosure in the public interest; and
5. records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates and informal working papers.

Dean Roger Cramton, former Assistant Attorney General in the Nixon Administration, recently consolidated these sweeping claims by asserting that executive privilege is most frequently and justifiably exercised in three of these



areas: (1) military and foreign affairs; (2) investigatory files of law enforcement agencies; and (3) testimony of presidential advisors. Mr. Cramton's one deviation from the formulation of Attorney General Rogers is his limitation of the privilege to advisors *to the President* and not to all members of the executive branch. On the other hand, Mr. Kleindienst's recent claims exceed even those of the Eisenhower Administration because the latter sought to insulate not all executive branch employees, but only those who were engaged in the "making of policy."

A discretionary executive privilege has no historical or judicial precedent, and is not supported by the doctrine of the separation of powers. Two of the three basic categories of asserted privilege—national security information and investigatory files—while raising issues about executive secrecy, can be explained and defined wholly apart from "executive privilege." The third category—internal advice within the executive branch—raises more difficult problems. While there may be a necessity for executive secrecy in this area, it is based on the same limited constitutional premise that justifies some secrecy among members of Congress and judges as well as executive officials: each branch of government has an implied power to protect its legitimate decision-making processes from scrutiny by the other branches. This does not mean, however, that *any* branch, including the Executive, can keep secret its decisions, or the facts underlying them, or shield wrong-doing by its officials or employees.

### *III. The untenability of a discretionary executive privilege*

History lends little support to the claims now being advanced by the Executive. It was not until 1835, during the presidency of Jackson—a full 46 years after the formation of the Republic and the enactment of the initial statute authorizing congressional inquiries into the workings of the Executive branch—that there was an unequivocal assertion of discretionary power to withhold information from Congress. The earlier incidents of executive questioning of Congressional authority during Washington's administration were cases which the Executive eventually acceded to the requests of Congress and did not confront the legislature with a refusal to disclose.

During this same period, a congressional practice developed of extending to the President a qualified "privilege" to withhold certain investigative reports and state secrets from public disclosure. In the instances where the offer by Congress was actually accepted by the President and documents were withheld, the congressional power to compel their release was explicitly recognized by both parties.

The judicial record is equally barren of authority sustaining the broad claims of the Executive. Although no Supreme Court decision explicitly rejects such a privilege, there are no cases in this country or in England that recognize it.

The most comprehensive attempt to muster judicial authority on behalf of an executive privilege was made by Attorney General Robert Jackson in a 1941 memorandum, declining to make available to the House Committee on Naval Affairs certain investigative reports of the Department of Justice concerning labor disturbances in industries with naval contracts. While some of the cases cited by Mr. Jackson support a limited power to withhold security data and confidential informers' communications from the courts, none lends credence to a discretionary privilege.

In the absence of historical and judicial precedents, we turn to even more fundamental sources of potential power, in particular, the constitutional doctrine of separation of powers. In our judgment, three distinct facets are involved, none of which supports an unreviewable executive discretion to withhold information from Congress.

1. The first is the Article I power of the Congress to conduct investigations.

Long before 1789 the English Parliament, in the words of Pitt the elder, was inquiring "into every step of public management, either abroad or at Home, in order to see that nothing has been done amiss." Legislative practices in the American colonies followed the parliamentary model.

While there is no express mention in the federal Constitution of a congressional power to investigate and gain access to the documents of executive departments, such a power was assumed from the outset to be a fundamental attribute of Congress. In one of its first legislative acts, for example, Congress provided in the Treasury Reporting Act of 1789 that "[i]t shall be the duty of the Secretary of the Treasury . . . to give information to either branch of the legislature in person or in writing (as may be required) respecting all matters . . . which shall appertain to his office." The statute was drafted by Alexander Hamilton, hardly an advocate of limited power.

An instructive definition of the scope of the congressional investigating power is found in *Watkins v. United States*:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

In *Watkins* Chief Justice Warren explicitly stated that "broad as is this power of [congressional] inquiry, it is not unlimited."

There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

These limitations, however, are designed to protect the rights of witnesses, and do not support a discretionary executive privilege. It is of course true that *Watkins* dealt with the power of Congress to obtain information from a private individual, but its broad appraisal of congressional power is consistent with history and with earlier judicial pronouncements.

2. The second aspect of separation of powers concerns the implications of the President's Article II power to "take care that the laws be faithfully executed." It is this general constitutional provision on which the Executive has chiefly relied to buttress its claim of a discretionary privilege.

Taken to its essentials it is a claim of inherent or implied power, because the general constitutional language surely does not authorize a broad discretionary withholding of executive information. The Supreme Court has reviewed a similarly broad claim of inherent executive power. In the *Steel Seizure Case*, Justice Black, speaking for the Court, rejected in comprehensive terms the claim of an inherent presidential power to override the will of Congress.

It is unnecessary to accept Justice Black's broad assertions about the lack of presidential power to reach his conclusion. In a more discriminating analysis in the same case, Justice Jackson distinguished three situations—those in which the President acts pursuant to an express or implied authorization of Congress, where his authority is at a maximum; those in which Congress is silent, where the President can rely only on his own powers and frequently the result is uncertain; and those in which the President takes measures "incompatible with the expressed or implied will" of Congress. In the latter situation, according to Justice Jackson, the President's power "is at its lowest ebb."

The case of executive privilege is plainly of the third type. While Congress has not legislated explicitly on the privilege, it has expressed its intention unmistakably to obtain all necessary information from the executive branch in statutes going back to the Hamilton Treasury Reporting Act.

Two other considerations, one textual and one rooted in history, support this conclusion. Concerning text, the only reference to secrecy in the Constitution is the power given to Congress to keep and publish Journals, except "such parts as may in their judgment require secrecy," and the only reference in the text to making information available to another branch of government is the duty imposed on the President "from time to time to the Congress information of the State of the Union." While nothing definitive can be read into these clauses, their presence in the Constitution cuts in the direction of legislative access to executive documents and away from executive discretionary authority.

Even more important than the powers explicitly found in the Constitution or those fairly implied are the numerous examples, multiplying in recent years, of executive action that seems to go beyond traditional bounds. For instance, Professor Kurland has recently prophesied, without enthusiasm, that we will continue . . . to see the President wage war without Congressional declaration, to see executive orders substitute for legislation, to see secret executive agreements substitute for treaties, and to see Presidential decisions not to carry out Congressional programs under the label of "impoundment of funds."

Other examples are available. The President has expanded the use of the Pocket Veto, has tightened White House budgetary controls over what used to be known as the "independent" regulatory agencies, and has twice devalued the dollar by executive action although a 1945 statute provides that only Congress can set the price of gold. Taken as a whole, these represent a significant change in the balance of power between the executive and legislative branches.



All this suggests that we should be slow indeed to permit the executive branch to accrete further power by uncontrolled discretion over the information it provides a coordinate branch. To acknowledge such power would increase the constitutional imbalance at a time when counter measures seem called for.

There are further aspects of the problem which underscore the danger of uncontrolled executive discretion: the vast expansion in the size and role of the White House staff, and the recent practice of assigning one person the dual role of cabinet officer and presidential advisor on the White House staff.

These modern developments emphasize the difficulty of accepting the President as final arbiter of the issue. For it is the President who decides the size of the White House staff, the allocation of responsibilities between it and the cabinet departments, and whether or not to fuse in one individual both line and staff assignments that formerly were kept distinct. To permit the President also to determine, finally, when an individual may be immunized from legislative questions or a document sequestered is surely to defeat the goal of a balanced federal government.

3. Closely related to the President's power faithfully to execute the laws is the question, also an aspect of separation of powers, of the role of the courts in resolving the problem of executive privilege. In our judgment, if an issue concerning the privilege cannot be negotiated, it should be for the Supreme Court to decide. Neither the President nor the Congress should be the judge in its own cause. Accordingly, just as we deny the right of the President to determine the issue finally, we also reject the suggestion that a Senate committee should be "the final judge on whether a White House aide could refuse to answer any of the committee's questions."

Of course there will be difficulties concerning a judicial resolution of a claim of executive privilege, assuming a proper controversy reaches the courts. But these difficulties pale in comparison with the present position, in which two unacceptable solutions are possible. The President may continue to be the final arbiter, in flat conflict with elementary notions of justice as well as the precept embodied in the Federalist Papers that "neither the executive nor the legislative branch can pretend to an exclusive or superior right of settling the boundaries between their respective powers."

It is sometimes suggested that executive privilege controversies can be settled, ad hoc, by what has been called "the accommodations and realities of the political process." We are not unmindful that this process of "accommodation" permits judicious leaks of information from the Executive to the Congress that could not be provided on the record, as well as the familiar informal meetings between congressmen and presidential advisors at which, presumably, valuable data is provided—in short permits a flexibility in the deliverance of information that many will regard as satisfactory. We reject this *modus operandi*, however, and we are pleased that many congressional leaders likewise reject it. A surreptitious and informal means of communication demeans the Congress and indeed the entire governmental process.

Finally, the problem of enforcement, while complicated, cannot serve to bring the political question doctrine into operation when all other indices point toward a judicial resolution of the issue. The enforcement of a legislative contempt citation against an executive officer would not appear to present the courts with more than an ordinary contempt case, although admittedly in an unusual context. The real problem would lie in compelling the contested disclosure. Since a court would not find it difficult to frame the appropriate relief, speculation about the executive's willingness to comply with a judicial order should not enter into consideration of whether the order should issue in the first instance. As the Supreme Court said in the *Adam Clayton Powell* case, in which it ruled on what the Congress maintained was an "internal matter," "it is an inadmissible suggestion that action might be taken in disregard of a judicial determination." We do not maintain that an absolute congressional power to compel information should be substituted for an absolute executive power to withhold it. All "unlimited power" is inherently dangerous, and it is the salutary function of the courts to circumscribe the boundaries of the executive and legislative powers so that neither branch is exalted at the expense of the other. The so-called executive privilege seems pre-eminently an issue to be resolved in this manner.

#### *V. The proper scope of the privilege assertable by the Executive branch*

If our conclusion is correct that a discretionary executive privilege is untenable, this does not foreclose the question whether secrecy can properly be

maintained by the President and his assistants in the three types of cases where a privilege has been asserted: foreign or military affairs, investigatory files and litigation materials, and advice within the executive branch. We shall now explore each of these areas of interest.

*A. Foreign or Military Affairs.* A degree of executive secrecy is probably necessary in foreign or military affairs. Nevertheless, the Congress must have access to foreign and military information in order to effectively exercise its express constitutional powers under Article I to advise the President in making treaties, to declare war, and to appropriate funds for raising and supporting armies.

Congress can, should and has delegated authority to the President to shield certain foreign and military activities from the public. It has authorized him to enforce administrative secrecy through classification. The classification system administered pursuant to Executive Order specifically derives its authority from provisions of the Espionage Act, the National Security Act of 1947, and the Atomic Energy Act of 1954. In the Freedom of Information Act, moreover, Congress has incorporated by reference the provisions of the Executive Order, and President Nixon, in March 1972, cited the Information Act as statutory authority for instituting reforms in the classification system through a new Executive Order. On the other hand, as the Supreme Court pointed out in its decision earlier this year in *Environmental Protection Agency v. Mink*, "Congress could . . . establish its own procedures for classification."

Information properly classified, therefore, may be withheld in certain circumstances from the general public and provided to reliable persons within the executive branch only on a need to know basis. But this conclusion provides no justification for denying Congress the foreign and military information it requires in order to fulfill its constitutional responsibilities. Accordingly, Congress has the power to compel production of such information by statute or Congressional resolution.

*B. Investigatory Files and Litigation Materials.* The second major category of information frequently included under the umbrella of executive privilege is information which the government may have to produce in court—principally investigatory files and other litigation materials. Roger Cramton recently described this as a "widely accepted legitimate area of executive privilege," agreeing with Attorney General Jackson that disclosure of investigatory files would prejudice law enforcement, impede the development of confidential sources, and result in injustice to innocent individuals.

It is unnecessary to dispute the validity of these conclusions to demonstrate that investigatory and litigation files need not be protected from unwarranted disclosure to Congress by anything so grand as an executive privilege. The government's law enforcement interest, as well as the privacy of individuals under investigation, are amply safeguarded by common law evidentiary privileges, by the statutory exemptions from the Freedom of Information Act, and by the constitutional protections against self-incrimination and denials of free speech and due process which apply in legislative as well as judicial settings.

Unlike the blunderbuss of an unreviewable executive privilege, these doctrines assimilate and attempt to balance competing interests in disclosure which are frequently advanced by private litigants, by Congress and by the public. Furthermore, it would be difficult to imagine a greater inconsistency in the law than that a private litigant could compel the disclosure of information from the Executive not accessible to Congress. But this is precisely the effect of extending executive privilege into the area of investigatory files and litigation materials.

*C. Advice Within the Executive Branch.* This brings us to the only aspect of the so-called executive privilege that deserves scrutiny as a possible constitutional privilege based on the separation of powers. That is, in the words of President Eisenhower, the power to withhold "conversations or communications, or any documents or reproductions" that relate solely to internal advice within the Executive Branch.

This "advice" privilege, as we think it should be called, has been the subject of unconscionably broad interpretation by the Executive. In our view, the privilege is not one that is exclusively "executive." Insofar as there is such a privilege, it would apply to attempts to extract data concerning the advice that judicial law clerks or legislative assistants render to their superiors. The principle involved is the necessity to protect the delicate internal decisionmaking process of *each* branch of government. Freewheeling debate among colleagues and the presentation of iconoclastic ideas are inhibited if the prospect looms of



later cross-examination. To require all advice to be subject to often unfriendly scrutiny would surely dry up many sources of innovation and truth.

There is a second reason for protecting the "advice" that flows from one official to another. It is essentially a recognition of the realities of power and personal vulnerability. Protecting the lower ranking individuals is especially needed because members of Congress, in their desire to score a point for the folks back home, may run roughshod over the reputation and sensibilities, if not the legal rights, of an honest but uninspired bureaucrat. If this can be avoided, it should be. This is why we conclude that if an implied constitutional privilege is admitted on practical grounds to allow executive officers to decline to testify, at the direction of the President, it should apply down the line to the lesser and weaker members of the bureaucracy.

The practical necessities of the case, however, may not be thought to justify a constitutional privilege, particularly since there is no express language in the Constitution to support one. In this view the courts would have a more limited, although still important reviewing role. An unsuccessful attempt by the Congress to obtain information from the Executive would not precipitate a constitutional question as to the scope of an "advice privilege," but it could lead to a law suit in which the critical question was whether the information sought was germane to a proper congressional inquiry. Courts might tend to shy from limiting Congress under such a vague standard. But because there would be situations in which the Congress reasonably needed to know what action or decisions the Executive took, but not what advice it acted on, there would still be a live question for judicial determination.

Under either formulation, the issue would remain, what sort of protection does the Executive require? Whom shall it cover, and what types of information? Who can invoke it, and by what procedures?

We shall now attempt, not without apprehension, to block out a workable and coherent set of principles answering these questions.

1. No witness summoned by a congressional committee may refuse to appear on the ground that he intends to invoke the "privilege" as to all or some of the questions that may be asked.

If an employee of the executive branch is directed by a superior not to testify, he should make himself available to explain the reasons for the refusal. Congress is entitled at least to this. Any other rule—and we fear that it is the rule by which we now live—opens the door wide to unjustified and even arbitrary assertions of privilege, and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. a. A witness summoned by a congressional committee could claim advice privilege only when accompanied by, and at the direction of, the Attorney General, Deputy Attorney General or Counsel to the President, who would assert that they were acting at the direction of the President personally.

b. A witness could decline to answer questions about recommendations, advice and suggestions passed on to superiors or associates for consideration in the formulation of policy. (Nor could Congress question others, including the superiors or associates of an employee, about such advice.)

c. An individual summoned could not decline to answer questions about policy decisions that he personally made or personally implemented. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

d. An individual summoned could not decline to answer questions about facts that he acquired personally while acting in an official capacity.

The separation of "fact" from "advice," while sometimes difficult, is not impossible. Indeed, executive departments are often required by the courts to make this separation in order to comply with requests for documents under the Freedom of Information Act and other litigation. Without the separation an advice privilege invites abuse.

e. Congress could require answers to questions about actions or advice by executive officials which it has probable cause to believe constitute criminal wrongdoing or official misconduct, such as the anti-trust settlement with ITT, as well as the Watergate events. In such situations, of course, individuals summoned before Congress would be entitled to exercise their constitutional rights, including, for example, the privilege against self-incrimination.

f. Past employees of the executive branch should also be able to exercise the privilege, since the possibility that advice given in confidence might be revealed

after an employee left the government could also have an inhibiting effect on free interchange. If called upon to review the exercise of a privilege over advice given by a former employee, a court in accommodating the respective interests of the legislative and executive branches might well conclude that the privilege is not permanent but expires after a given period of time—for example, a set number of years after a change in administrations, or the death of the former advisor.

3. a. Documents could be withheld from Congress or a committee of Congress only on the personal signature of the President.

b. The privilege should extend not to entire documents but only to those portions of documents that embody the criteria we have set out to justify an exercise of privilege. It would have been proper, for example, for the President to have ordered purely advisory parts of communications among the Pentagon papers to be withheld from Congress if he had complied, as he should have, with the Senate Foreign Relations Committee's request for the documents in December 1969.

Executive privilege is inconsistent with constitutional principles underlying the investigative power of Congress and the judicial reviewing function of the Supreme Court. The executive branch is therefore on weak ground in asserting that an entire document may be withheld solely because a portion of a document contains "advice." Of course, if facts within the personal knowledge of a witness, or information relating to decisions that a witness personally made or implemented, are "inextricably intertwined with policy-making processes," secrecy should prevail. But if the separation can be made, Congress is entitled to the information not protected by executive privilege.

[Whereupon, at 12:45 p.m., the committee recessed.]



# EXECUTIVE PRIVILEGE SECRECY IN GOVERNMENT FREEDOM OF INFORMATION

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WEDNESDAY, MAY 16, 1973

U.S. SENATE, SUBCOMMITTEE ON INTERGOVERNMENTAL  
RELATIONS, COMMITTEE ON GOVERNMENT OPERATIONS;  
SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE  
ON THE JUDICIARY; AND SUBCOMMITTEE ON ADMINIS-  
TRATIVE PRACTICE AND PROCEDURE, COMMITTEE ON THE  
JUDICIARY,

*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 3302, Dirksen Senate Office Building, Senator Edmund S. Muskie presiding.

Present: Senators Muskie, Kennedy, Chiles, Thurmond, and Mathias.

Also present: Walker F. Nolan, Jr., counsel; Joe L. Pecore, assistant counsel; Arthur S. Miller, consultant, Subcommittee on Separation of Powers; Alvin From, staff director; Alfred Friendly, Jr., counsel; Lucinda T. Dennis, chief clerk, Subcommittee on Intergovernmental Relations.

Senator MUSKIE. The committee will be in order.

I have a brief opening statement.

## OPENING STATEMENT OF SENATOR MUSKIE

Our hearing today continues the inquiry we began in April into executive privilege and Government secrecy.

This morning we will concentrate specifically on the workings of the system for classifying information in the executive branch.

Until now the Congress has tended to regard this complex area as a field best left to executive discretion. We have relied on that branch to decide the delicate balance between confidentiality and candor and to police its own housekeeping procedures.

Evidence has accumulated, however that our reliance was misplaced. We have seen how those who hold secret information can misuse their privileged knowledge to disclose only those portions which serve their own interests or only to journalists who favor their policies. We have even, recently, seen that such officials can falsify secret documents to try to distort the judgment of history.

And we have heard testimony indicating that internal reform of the system is still a distant goal. The new Interagency Classification Review Committee established last year to monitor 34 agencies and

over 18,000 individuals—with full power to classify information meets once a month. It has a full-time staff of one professional and one secretary. Its claim to have spurred the declassification of 35 million pages of World War II documents—leaving 125 million pages of the period still secret—is put into perspective by the revelation that some 70 percent of the documents declassified were done so automatically, because they were 30 years old or older.

So the burden of changing this system—of assuring that it works both to protect information which must be protected and to inform the public fully of what the public must know—falls on the Congress. Seeking effective change—the task before our subcommittees—we must find ways to control the power to classify so that self-serving decisions to withhold information will be systematically and impartially reviewed, forcefully challenged and, when necessary, reversed. We must devise secrecy standards for both the Congress and the executive, guides that interpret the requirements of national defense in the light of democracy's need for public information.

So our hearing today is not an examination of one famous case of disclosure. Nor is it an investigation of Government misconduct in combating that disclosure.

We are not here to sit in judgment on a specific case or the principal figure in it. We are here to examine the system that produced that case and the way that system can be made to function in the public interest.

Senator Mathias?

Senator MATHIAS. Mr. Chairman, I would only say that I have just come from a breakfast meeting in Baltimore in which a large part of the discussion was devoted to the sense of cynicism and frustration, near despair, suspicion of motivation of a great deal that goes on in Government and the discouragement which citizens feel when they are asked to participate in Government because of the wall that is built between institutions of Government and citizens for whose benefit and at whose discretion Government is supposed to operate.

I think these hearings should be directed toward removing that wall toward making Government more open, and I think if they can serve this purpose—and it is a goal that we in the Congress have to observe in our own operations as well as in the operations of the executive branch—the hearings will well have been worth the time and the investment and the time of the committee.

Senator MUSKIE. Dr. Ellsberg, on behalf of the committee I would like to welcome you and express my appreciation for your willingness to appear so soon after your personal experience, as we seek to develop the policies necessary to deal with this delicate, frustrating, and complex problem.

So I do appreciate your willingness to testify.

Senator CHILES has just come in.

Senator Mathias has made a brief opening statement.

You have none?

Senator CHILES. No.

Senator MUSKIE. You may proceed in your own way.

You proceed and then when you are ready to submit to questions, we will direct some to you.



## STATEMENT OF DR. DANIEL ELLSBERG

Mr. ELLSBERG. Thank you, Senator Muskie.

As you can understand, over the last week and last 5 months, I have not been drafting statements, but it was suggested I speak for about 20 minutes and then have questions, though I will be glad to be interrupted at any time.

I do feel my being here this week and in these halls represents a celebration not only for me, just as I think the hearings about to start tomorrow are a celebration not for one party, not for one branch of government.

What I mean by that is that nothing could better exemplify the spirit of this country and this Constitution than the existence of these hearings and the facts they are bringing out to the American people.

The facts themselves are painful to us and startling to everyone in the world, yet I suspect in most countries in the world, including those countries Mr. Nixon recently visited, the strongest impression of this kind of disclosure and governmental check and balance taking place is that we live in a world so different from theirs.

In fact, I literally was just reminded as you spoke to me here, you asked me if I had been under similar circumstances before, and it reminded me when I had been:

On May 13, 1970, I spoke before the Senate Foreign Relations Committee, among the chaos in Washington, during the Cambodian invasion. We are reminded that invasion was a little more than 3 years ago.

It was a country almost untouched by war.

Since that time not as many bombs have fallen on Cambodia as on South Vietnam, and yet, as you know, half of the population of Cambodia has been made into refugees, 3 million out of 6.7 million in the 3 years since I spoke here.

That makes me feel not a fool——

Senator THURMOND. Mr. Chairman, if you would have him speak up. We can't hear him.

Mr. ELLSBERG. I was saying that this is almost an anniversary for me of 3 years since having addressed previously a committee of Congress, the Senate Foreign Relations Committee, and I spoke in the midst of clouds of tear gas in Washington.

As a matter of fact, the famous Senator on your right, Senator Mathias, and I flew back from a speaking engagement in St. Louis, came down to the city of Washington, and on that day Senator Mathias got me in a car and we drove by a city that was already beginning to smell of tear gas and hundreds of thousands of people had come to protest. They were exercising their rights in the only way they knew how to exercise their rights at that time.

Congress was investigating what was going on in Cambodia. What is still going on.

Despite the will of Congress, since as we all know in the few months since the alleged cease fire in Indochina, we have dropped as many bombs on Cambodia and Laos as the United States dropped on Japan in World War II, all of World War II. That is 145,000 tons of bombs, almost exactly what we dropped in Japan.

But I am here not to speak of the impact on all these countries but on our own country.

As you reminded me of that today, I have my opening statement of which I would like to read one paragraph, which was very much off the top of my head because of what was happening 3 years ago, May of 1970, when I said to Senator Fulbright who was chairman of the session,

Personally, I thought during the last couple of years of protest in this country it was still possible to exaggerate the threat to our society that this conflict posed for us. I feared that we might come to a pass in which there would be a major threat to our society but we were not there yet. . . . But I am afraid we cannot go on like this, as it seems likely we will unless Congress soon commits us to total withdrawal—and survive as Americans. There would still be a country here and it might have the same name but it would not be the same country.

I said 3 years ago,

I think that what might be at stake if this involvement goes on is a change in our society as radical and as ominous as could be brought about by our occupation by a foreign power.

I would hate to see that and I hope very much that deliberations such as the Senate is undertaking right now would prevent that.

Unfortunately, those deliberations did not end what was happening in Vietnam or in this country.

How shall we call what was happening in this country, as we prepared in the last year or two to celebrate in a superficial manner the 200th anniversary of our Republic, the year of 1976.

I sometimes ask myself whether we faced the betrayal of our Revolution by or before 1976. I am assured by this hearing and my being here and by the end of my case that the American Revolution does live and we are here because we all realize that it does need a renewal at this time, in substance.

How could these bombs have been dropped despite the will of Congress?

I believe that secrecy, executive secrecy has had a major role to play—and that is the subject of these hearings—in the path that has led us to the Watergate and to the war that continues in Indochina.

Over the last year when I have been questioned by newspapermen I have really been dismayed to discover how quickly to the minds of Americans come questions that reveal their fear of openness. Even newspapermen, the people who printed the Pentagon Papers—some of them got a Pulitzer Prize for it—think very quickly: But don't there have to be secrets?

What if everyone did what you did? All of which of course are fair questions, that you are addressing and you have addressed.

What dismayed me is that it seems they are much more aware of the risks of no secrecy than of the risks of secrecy. The risks of no secrecy are the risks of democracy. That is a gamble that the Founders of our Constitution made for us 200 years ago.

The question is: Are the Bill of Rights, and the constitutional checks checks and balances obsolete in the 20th century?

Have nuclear bombs made it impossible for an American Government to be open to its own people, as so few governments in the world are today?



Isn't it impractical and naive and idealistic to imagine that government can be transparent to its people or that the homes of citizens can be allowed to be opaque and impenetrable to the police and to Congressmen?

I am saying these are attitudes shared not only by executive officials and not only by police, but really by every class of people including Congressmen and newsmen.

I expect questions and I welcome questions along those lines today because they are part of the problem.

I would use my opening statement to answer the unasked questions. What are the costs and risks of executive secrecy, however beneficial it might be?

Very specifically, I believe that the price of executive secrecy of the sort we have practiced over the last generation has been Vietnam in foreign affairs and Watergate in our domestic affairs.

The two together spell the subversion of our form of government and spell death not only for Americans but for more victims who are not American.

In fact, I heard Senator Mathias speak of a mood today of cynicism, suspicion, distrust.

Is that a symptom of sickness or of health?

The fact is that our Constitution was written in a spirit of cynicism, suspicion, and distrust, and every clause reflects those attitudes, every clause reflects the attitude that humans in authority and power cannot be trusted to become angels by virtue of their office; cannot be trusted at all, as a matter of fact, and need to be set watching each other. Branches of government must be given special rights to investigate; the press must be given protection from government so that it can expose the government and monitor the public servants and keep them from abusing the power they inevitably hold, the power to kill, make laws, repress, the power to wield the police authority.

So the spirit in our citizenry at large of cynicism and skepticism is healthy.

Democracy may not be the most pleasant form of government. So I say we are alive now and we have the responsibility, and the issue was not what was chosen 200 years ago, but what we should choose today.

I want to argue why we should make the same constitutional checks and Bill of Rights as 200 years ago and why they are not, in my opinion, obsolete.

In particular, I speak not as a lawyer, let alone a constitutional lawyer, but as someone who has had a very expensive education in the law of secrecy over the last 5 months and before that as someone who had an expensive education in the practice and attitudes of secrecy, who lived in the world of secrets for 12 years before that, a period when I certainly did not know much of the law of the Constitution because I worked for the executive branch. I worked for the President and thus I thought I was beyond the law, like all other executive servants.

The attitudes that we are seeing in the White House today did not start with the Republicans or this administration. Their attitudes are absolutely familiar to me in every respect from my own time even if the actions have gone further.

But the first thing I want to suggest is the attitudes which have been growing for 30 years now in the executive branch, even if they never led to actions of the sort we have heard about in the last months.

It started, I think, first in the New Deal answer to the Depression, where it was thought that central government and the executive branch was the only solution to our problems; next, in a world war in which it was obvious that was the case: where we needed a kind of military leadership exemplified by a commander in chief.

That President Nixon likes to use that title today, 30 years after World War II, is a sign of sickness in our society, but I think an inevitable kind.

The Pentagon Papers—which I felt Congress needed to know 4 years ago when I first came to Senator Fulbright—revealed to me, above all, a conspiratorial style in executive decisionmaking, a style that I was part of in the 12 years that I have worked with it.

I think that doesn't answer the question but rather poses the question: Why have our executive officials been led to act as if they are members of a conspiracy? Because I think that does describe it.

I repeat and I will repeat it again, I am sure, what we are seeing in Watergate is the same attitudes, the same style, the same conspiratorial attitude we have used for generations to subvert self-determination in other countries in the world.

I am including in that process South Vietnam, something that I witnessed at close hand in the time I spent there.

We are seeing the same attitudes and, indeed, the same personnel brought home, people we have sent abroad to subvert Cuba or South Vietnam or North Vietnam: we brought them home and they are doing their thing here and their thing is subverting democracy, their thing is working for the President and the executive branch. And executives in every country of the world understand each other better than they understand their own citizens.

To get relatively specific here, I want to describe a little bit of the feeling that is imparted to these people when they enter, as though a priesthood, when they enter the executive branch, as I did in effect 12 years ago, although I was working for the Rand Corp. which was a consultant to the executive branch, but had a special relationship privy to many of the secrets.

I could sum it up by saying that secrecy corrupts just as power corrupts. The secrecy now is corrupting. Perhaps I could cut through it best by just relating to you some advice that I gave to a man who entered Government 4 years ago, and I might as well name him—Henry Kissinger—someone I had known academically or professionally for 10 years.

By that time, I had been in the system for more than a decade. It seemed to me it was appropriate to pass on some thoughts to him in advance and perhaps inoculate him against the transformation that I feared was going to come over this person.

It was appropriate to do it to this person because I felt he was going to be initiated into the most esoteric and sinister parts of this system.

He was not only going to have a top secret but perhaps a score or two score, for all I know, of the clearances higher than top secret of



which I had held an even dozen when I worked as special assistant to the Assistant Secretary of Defense.

I told him at that time, and he may well not remember this conversation, or deny it, but I am sure you will give him equal time if he finds I am saying anything inaccurate and will be glad of the opportunity to do it, I am sure.

But in December of 1968 in the Hotel Pierre, before he took up residence in the Executive Office Building, I said to him, "You are about to get 10, 15, or 20 clearances of a sort that you never knew existed. Their very names are classified." I am elaborating here a little for your benefit on the assumption it might be necessary for some of you.

Their names are classified, unlike the words "top secret."

Code words that identify them on pieces of paper are classified.

They are referred to by the first letters of their codewords; they are never to be photographed. In fact, when one special assistant to the President—I am adding now—was once photographed with one of those code words on a piece of paper in addition to the words "top secret," a quarter of a million dollars had to be spent changing that word wherever it existed.

Why a quarter of a million dollars? Because it existed on hundreds of thousands of pieces of paper not one of which is available to your staff and which you yourselves would have considerable trouble getting.

That applies only to the lowest of these clearances to which I refer.

As I say, I had a dozen.

Secretary McNamara had at least a few more. I wouldn't suggest how many each person had in the Defense Department. Persons in the White House could have many more in the NSA and CIA and many places I didn't deal with.

Coming back to Mr. Kissinger, "The first impact," I said, "will be upon you when you feel like a fool, because you have written books on subjects of defense and foreign policy."

His first book was "Nuclear Weapons and Foreign Policy."

You have written articles and rubbed shoulders for a decade with people who had these clearances and access to information that you didn't know existed, and you will feel like a fool because you didn't know it. You will feel like a fool for having written all that without having this special information on which to judge. You will realize that the people that you talked to had it and you didn't.

But that feeling will only last for a week or two, because after a week or so of having four-star generals, or at that time one-star generals, like General Haig bring you in special brief cases, special pouches, books that are available only to you and your boss and a few other people—and I will get back to that—that are not available to Senators or James Reston or Arthur Krock, unless occasionally, and certainly not to members of the public, you will forget that you were once a fool and remember only that everyone else is a fool who does not have this information.

Moreover, in signing agreements to have this information, you will come to understand that the only way of keeping secrets this well is to lie.

A contract to observe those clearances, and these are essentially contractual arrangements in the executive branch, conditions of employment, is a contract to lie; in a good cause, it would appear to protect intelligence secrets.

When I say lie, on the first hand, if you are asked if you have this clearance, you are not allowed to say, no comment. That would confirm it. Your duty is to lie and say you do not have it.

If you are asked about the contents, you are to lie and say you know nothing about the contents.

If you are asked whether you have a particular piece of information, you must lie and say you do not.

These go back to the practices of World War II, when thousands of civilians were introduced to the need to lie to their fellow scientists despite the supposed sharing of scientific information. Lying is legitimized with an enemy like Hitler or Stalin. Thus, some people learn these practices in a context that seems thoroughly legitimate to them and inevitable.

But I went on to say to Kissinger:

The effect of that is that you will have to lie and you will succeed in lying and you will fool your former academic colleagues. You will discover, in collaboration with thousands of other executive officials all telling the same cover story, that it's easy to fool people.

And that is what the President learns.

I suspect that those of you at this table in your life have fooled this person or that, but you also know you are subject to reelection, whether it is every 2 years or 6 years, and that there is a limit to how many people you can fool and how much.

In fact, if I have learned one thing in 5 months in court, it is to respect the wisdom of allowing 12 ordinary citizens to be the judges of truth or honesty on the witness stand. I believe they are shrewd and extremely effective weighers of lying on that stand and those are the people you deal with.

But you will find if any of you go into the executive branch, you will discover that given the benefit of the doubt that accrues to the President or anyone who works for him, it is easy to fool people. There really are secrets and they are very well kept.

The notion that everything comes out in the New York Times is untrue. It is a cover story meant to keep people from prying too closely because they will supposedly read it next month anyway in the New York Times. That is untrue.

You will learn as Kissinger would, as I told him, you will learn there are secrets that are very well kept, that people can, in effect, be easily fooled if you work for the President; and it is a short step which is hard to avoid making from that perception to the belief that they are fools, and that they have no legitimate role in decision-making.

You have the information, they don't; they don't even have the wisdom to know what they don't know: therefore they have no legitimate role.

And that applies not only to my jury, but to you gentlemen sitting right there, the Senate of the United States.

So from that time on, and that could be a matter of weeks from entering office, and it could happen to anyone of you, Senator Muskie, with all respect, you have been a candidate and may be again a candidate for the highest office and in effect I am talking to you with full respect.

What I would like to say to you, since I have the chance, to anyone who might enter the White House or any part of the executive branch: The security system is an education in contempt for law, because you cannot be held accountable to law, at least we used to think we could not if we worked for the President, whose Justice Department controls the Federal indictment process.



You are then beyond the law if you do the President's wishes, and the President is thought to be beyond the law.

Moreover, you cannot be accountable to Justice or even the public if the secrets of your advice and your actions are bound to be well kept.

You are safe from accountability. Contempt follows for the public that is so easily fooled, and that contempt is the death in that individual for the democratic spirit.

Indeed, we cannot, our democracy cannot be served or guarded by people whose basic core of belief is contempt for the democratic process and for the citizens who elect them and to whom they supposedly are responsible.

So, finally, I went on to say to Dr. Kissinger a little colorfully:

You will become, if you yield to this process, you will become unable to learn from anyone who does not have these clearances.

Someone will stand before you, whether Walter Lippman or a past former official—a former official is different because he knows what you know and perhaps you can talk to him—but someone who has never had those clearances, you won't listen to. You would have to ask yourself, "What would he be telling me if he knew what I know?" and that is just too much work and you will stop listening and from then on, conversations will not be conversations. They will be situations in which you listen to someone while you ask yourself, what do I want from this man; what do I want him to believe? Not, what can I learn from him?

Because most knowledge resides outside the executive branch, you will be cut off from that and you will become something like a moron.

I knew him at that time, not well, but just well enough to say that, considering it was important enough.

This was the image in my mind on the effect of secrets on a high-level official; not the low level because mere top secrets don't have this effect, they are so low, so close to what you read in the New York Times; but the other information, much of which is wrong, much of which is contradictory, much of which is incomplete, but which nevertheless is different from what you read in the New York Times.

So you live in a different world of information. You come to think of yourself as a resident of a different world with different powers and responsibilities.

As I say, I thought of that access like the potion that Circe gave Ulysses' men that turned men into swine, and made fools of them.

I have talked long enough to establish that point I think. I should say this doesn't come just from reading the particular information. The secrets are kept not only by this conspiratorial type of honor among thieves, but by the entire apparatus of conspiracy and that is the last point I want to touch on here.

I am saying, I have to reiterate, the secrets are better kept than you know, and I am well aware I am talking to you as Senators, and I am talking to the press and public.

I am saying I have never met in 12 years working for the executive branch a newspaperman, no matter how canny, how experienced, who could imagine how often and how easily he was lied to by my bosses.

That is one thing I hope to suggest by the Pentagon Papers: people should be more skeptical and probing.

In the field of foreign affairs we have come to expect this from the President; it is his job and we don't need to know.

The President shares that belief: That the public does not need to know and cannot be trusted with the information—the two requirements of sharing information with him, in the regulations.

But the need for this conspiratorial style, as I say, starts with the notion that you are fighting a subversive enemy, like Hitler or Stalin, and must imitate his methods.

To do that you must build a physical capacity to keep secrets. That begins, of course, with a dedicated corps, a bureaucracy that can be relied upon to keep their mouths shut.

But that is not hard for a President. The prestige and the power he offers them and the threat of taking that away is more than enough to keep their lips sealed most of the time.

But next they have to have an apparatus to keep these secrets even from their own secretaries—and you will recognize that is a very unusual state of affairs—or their own deputies or wives, people who work closely with them.

If you are interested, I will go into that more later, but let me give you a slight feel for it. If you had worked all your life with top secret material in the Pentagon for Assistant Secretaries, unless you were one of the elect, you would not be aware that there are entire rooms in the Pentagon with safe doors outside, with a guardian, with a computer list up to date hourly and daily as to who is admitted in that room, and unless you know the codeword and are on that list, you cannot enter that room or know of its existence.

It will have a very nondescript door in the hall that will not suggest what is inside. You can go in that room and discover yourself in something like the reading room of the New York Public Library, not a closet, not a safe, but a room with charts, with library shelves of material, no word of which you were previously aware existed.

You did not know how it was gotten. You did not know the President had this kind of information at all. Of course, the effect of that is very euphoric at first. You go around and take things off the shelves and begin reading it and imagine you are about to learn all the answers, that Godlike knowledge is now available to you.

Now, you can be introduced into one of those rooms and still have no idea that there exist still other rooms with other sources of information, other access lists just as large and just as secret.

I would say it is not until you have four or five such clearances, that the next level of mystery is revealed to you. Then you become aware that there is no limit to this; that these clearances can be generated very quickly in a day or two; and such types of information can be segregated—I am not saying only from the public or Congress, but even from other people who have two or three other clearances—very effectively.

Once you have a dozen, from then on, you live in the knowledge there must be others you don't have.

I still keep finding out about new ones.

Could there be clearances the President doesn't know about? Of course, certainly, without any doubt, because the physical nature of generating these things is such that they can multiply and proliferate in a way that no individual has any way of knowing about.

I am not saying that is the case in Watergate. I do not believe it is. My suspicion—for other reasons than I can go into, for substantive reasons—is that the President—and I am not convicting him; I am stating my experience and belief—the President likely knows all those details.



Could it, however, be withheld from him? The answer is "Yes," and even by close associates.

The reason I am going into this is that this committee, if you are interested in secrecy, should explore the world of secrecy, to restrict and change it and bring it under control.

Unless you have a sense of the variety of that world and its dimensions, you really won't be able to do it.

I will close with the fact that 1 year later, I saw Henry Kissinger, then in San Clemente, the Western White House. I had gone there in part to give him my sense that the Cambodian operation and what I knew of his Vietnam policy was a replay of the experience that I regrettably lived through in the Defense Department in 1964-65. Not only the smell of conspiracy was in the air, but the very details, every aspect was recapitulating every aspect I went through and kept my mouth shut about in 1964 and 1965, when two Cabinet Secretaries and the President, two Secretaries were lying to Senate committees in executive session, lying not because they were different from current ones but because they had little chance of being found out by U.S. Senators.

You might remember just parenthetically that at one point Secretary McNamara, testifying about the Tonkin Gulf incidents, forced every staff member to leave the room because they were not cleared for this information.

That was the lowest level of clearance above top secret, what we have read in the newspapers the last 2 days, by official release, described as "Comint," communications intelligence, which has special code words.

The Senators at that moment were allowed to see it but not really examine it and in fact, knowingly or not, Secretary McNamara deceived them as to the meaning of those cables.

That is what Anthony Austin, the New York Times newspaperman, in his book, "The President's War," stated.

What I want to state here is that the super-secret material which the Senate staff was not able to see, as I say, was "Comint."

"Comint" is the lowest of these clearances that I have described, the next highest above top secret.

Top secret, you have heard in testimony, top secret is accessible to 400,000 to 500,000 people, a large number of people, though a small part of our electorate.

Comint clearance, of course, is far more secret, far more sensitive. That is why your staff couldn't see it, and that is why you don't see it routinely the way the President does.

It is accessible to only about 120,000 people. Not to the 535 Members of Congress or their staffs; they can't be trusted, but to 120,000 sergeants, warrant officers, generals, and Cabinet Secretaries.

The next clearance above that cuts way down to about 14,000 to 20,000. What I am saying is that the world of secrets is lived in by a very large number of people, though a very small part of our electorate and only one branch of our Government.

Henry Kissinger lives in a much smaller world, a world that for some pieces of information might be inhabited only by a couple of people.

Although one White House staffer told me about Henry's relations with General Haig at that time, "I wonder if Henry realizes there were certain things known only to him, the President, and the Army General Staff," thanks to that particular liaison, so it wasn't quite as discrete as I thought.

But I am saying, as many as 100,000, or 400,000, nevertheless keep secrets very well because of this apparatus of conspiracy, special channels, special couriers for each clearance.

The couriers for one clearance do not know the existence of the other ones. Special briefings, special access lists, special libraries, each separate, the apparatus of an espionage ring; a Government that consists of cells but with the President at the top.

Certainly, when I say there are clearances that the President may not know of, I say that only to make a point. The more important point is, the President does know virtually all of this and spends too much of his time in a James Bond role in running a mere apparatus.

After a year of his indoctrination, I came upon Henry Kissinger living on Circe's Isle. I could see the effects pretty clearly. I wanted to tell him first that his Vietnam policy was not necessarily a secret. It was a policy of escalation in my opinion, although too many people thought it was a policy of withdrawal.

I wanted him to be aware that was visible.

Basically, they were fooled for 4 years. A mass hoax was played on the American public. A preplanned policy of escalation likely to bring us into Laos and Cambodia and North Vietnam, into the bombing of North Vietnam: All that was likely in the spring of 1969 when these White House phones began to be tapped, and that is why they were tapped, because that had to be kept super-secret. And it was carried out to the tune of 4 million tons of bombs by a President supposedly ending the war.

But I wanted to tell him to read the Pentagon Papers to learn from them, to learn as I had, to make known the same mistakes to him.

When I asked him if he had the Pentagon Papers, his answer was, "Yes," which I knew. I knew they were in the White House.

Some years later, when they were revealed, he was asked when he heard of them, and his answer was, "When they came out in the New York Times."

That was a lie. But as I say, President's men think they have a right to lie, always.

I asked him if he had read them. He said: "No." I said he should at least read the summaries or members of his staff, like Winston Lord, should read these and learn lessons from them.

His answer was: "But do we really have anything to learn from these studies?" At which point I recognized a man who had been eating honeydew for a year, and that the Republicans couldn't learn from Democrats any more than the Democrats could learn from the French.

I said: "Yes, this is 20 years of history; yes; I do think you have a lot to learn from it."

He said: "But we make decisions very differently now."

I said: "Cambodia did not look so different."

He said: "Cambodia, you must understand, was made for very complicated reasons." Secret reasons which could not be exposed to the Senate or the Congress, and therefore couldn't be discussed or



argued with, reasons so foolish, and yet their foolishness could not be exposed by democratic give and take because they couldn't be discussed.

That is why men can live with moronic policies for years, because they are secret.

I said,

Henry, there hasn't been a miserable policy in Vietnam in the last 20 years that was not made for very complicated reasons.

When I mentioned honeydew, I am thinking of Samuel Coleridge's *Kubla Khan*:

Beware! Beware! His flashing eyes, his floating hair! Weave a circle round him thrice. And close your eyes with holy dread. For he on honeydew hath fed. And drunk the milk of Paradise.

I recognized the man who had been eating secret honeydew for a year and there was no talking to him, keeping him from the course that led us to 4 million tons of bombs and to making half the population of Cambodia refugees.

That is the task which is up to you: To decompress, to deintoxicate these officials. Don't ask them to do it themselves.

Only you can take charge of the secrecy process. Learn about it first—expose it, collapse it down to where it is in your control and where it is no longer a threat to the democratic process.

Only that can keep us alive as Americans.

Thank you.

Senator MUSKIE. Thank you, Dr. Ellsberg, for what I think is one of the most perceptive exposures of the corrupting ability of secrecy this committee has heard.

I think it is a terribly important contribution to the record.

I assume you have heard of, if not read, David Wise's book?

Mr. ELLSBERG. I have received an advance copy, but I haven't had the chance to read it.

Senator MUSKIE. "The Politics of Lying."

Well, I haven't had a chance to read it altogether, but I have read two or three chapters that touch the same points, some of the same points that you did, this morning.

I think because there are several Senators who are present who would like to ask questions, we will begin by observing the 10-minute rule on questions and then take it from there.

Mr. ELLSBERG. I apologize for taking longer.

Senator MUSKIE. No apologies necessary.

I would like to ask you two or three fundamental questions to begin with to emphasize some points about our policies of secrecy.

First of all, the classification system has no basis in statutory law?

Mr. ELLSBERG. Yes.

Senator MUSKIE. It is entirely a Presidential system?

Mr. ELLSBERG. That is correct.

Senator MUSKIE. It did not exist at all prior to World War I and was only military prior to World War II; is that correct?

Mr. ELLSBERG. That is correct.

Of course, there had been military restrictions on military history that go back through our system. But as a formal administrative system, that has blossomed from the Second World War on.

Senator MUSKIE. It wasn't until President Truman's action following World War II, that the system was expanded from the military departments and spread out to cover other agencies of the Government?

Mr. ELLSBERG. That is correct.

Senator MUSKIE. Now the conspiracy count against you charged that you conspired to defraud the United States by impairing, obstructing, and defeating its lawful governmental function of controlling the dissemination of classified Government studies, reports, memoranda, and communications, and your defense argued that no statute or combination of statutes could be read as creating such a sweeping governmental function. The question before Congress is whether or not there should be a law controlling the dissemination of classified information.

Do you think a sound law is possible and where is it needed?

Mr. ELLSBERG. I do think that whatever the process of keeping secrets, it should be brought under congressional scrutiny and that can only be done, I believe, first by, as I say, investigation and exposure as is happening here and in the Watergate and Ervin committees.

I have learned a tremendous amount from the large volume of the Moorhead hearings and Ervin hearings which I read in court in dull periods and with great benefit.

The first process is to expose it to the public and the second is to take control of it by statute.

Senator MUSKIE. So you agree, notwithstanding your deep feeling about the corrupting ability of secrecy, you still believe there are secrets that the Government needs to protect?

Mr. ELLSBERG. Yes, of course, but the question is where do you draw the line, and even more fundamentally, who draws it?

If I have come to one clear conclusion after, as I say, 12 years working in the executive system of secrecy and several years of thinking critically about it, it is that democracy cannot let that line be drawn by any one man, the line between inside dope and outside ignorance or fools.

There is room for some suggestive puns there. I believe this is a dope; that it is addictive to the executive officials and it makes them into dopes.

It is a class of inside dopes, as a matter of fact, but as I say, it makes them moronic.

But the line must not be drawn between the executive branch or the legislative branch or the courts.

The question of who draws the line is, as I say, very fundamental.

Congress must have a role in both setting the guidelines for the system and keeping the amount of secrets down to a reasonable level which has no relation to the current status.

The word "reduction" of secrets hardly describes the process that means that there should be one-ten-thousandth of the number of secret pages.

There are right now a billion pages of classified information. The administration is very proud of having declassified recently some 29,000 or 30,000 pages, if that is what it is.

Senator MUSKIE. Thirty-five-million, I think.

Mr. ELLSBERG. Million, fine. I am off by a very large factor.

Thirty-five million is still—by the way, I think you are wrong as a matter of fact.



Senator MUSKIE. Well, it is the administration's claim.

Mr. ELLSBERG. Let's see what my concentration during the trial—my memory is—you are correct. There are 160 million papers from World War II. Thirty-five million. It is hard to believe. I can't sit here talking to you and believe they have declassified 35 million pages, leaving only some 125 million left from World War II, plus about 350 million from the end of World War II to the end of Korea, and another half billion pages since Korea.

That is a billion pages of classified information.

So if you cut that down by let's say of a factor, not of a thousand, but of 10,000 or 100,000, you would still be left with too many secrets.

That is the task before you and as I say, that is a task that is not a task for a handful of librarians crossing through "top secret" on a bunch of pages. It calls for wholesale declassification by period and subject, wholesale and by legislation that keeps that from happening again.

Senator MUSKIE. What standards should be devised for defining the need for secrecy?

Mr. ELLSBERG. I put first emphasis on standards that would keep the system within the bounds of democratic government.

You could approach this from two directions, of course.

Congress has passed separate statutes that involved nuclear weapons data and communications intelligence and for them one could say that an official secret sense does exist despite the first amendment.

I might say, by the way, that I was frequently and ruthlessly accused 2 years ago, when the Pentagon Papers came out, of threatening communications data or codes, threatening codes.

I knew that not a page of those documents compromised codes for the simple reason they didn't have the right words. Had they in fact threatened codes I knew very well they would have had one to a dozen other words on that cover that would have warned me very effectively, and I had no desire to compromise codes.

I think Congress does have that power to devise the same kind of narrow standards, then. In fact, I am not sure law should go beyond that except to establish a category of secret as William Florence, my consultant—I learned much from him—has suggested, that the notion of a single category of classified defense information might be worth while. But the key points there are that, in principle, any secrecy about Government operations is to some extent an abridgment of our First Amendment.

Freedom of speech, freedom of the press, and implicitly behind it the freedom to know and gather information is, above all, given to us in hopes of maintaining this a republic, so that citizens shall know how their officials are working.

It is the absolute core of our Government. So any abridgement, of course, has to be regarded with the utmost skepticism and worry.

But as I say, Congress has to make some allowance for some abridgement and so does the Supreme Court.

The key characteristics that make that viable in a democracy are: the number of secrets must be very small; so the guidelines have to be set to keep them small; but above all, the system must be monitored as it goes on to see that the guidelines are being met.

Third, there must be a form of appeal both in the executive branch, in Congress, and in the courts.

Not one of these three characteristics is currently possessed by our classification system.

Everything is routinely classified. That is why there are a billion pages of classified material.

There is essentially no monitoring of the process by anybody, or anything leading to the same result, and almost nothing gets declassified.

In fact, you can't challenge that classification in the courts. Most judges have refused to question the validity of the classification.

Our Judge Matthew Byrne, in fact, did allow us to challenge that not formally, but implicitly.

Certainly Congress has not thought itself to have the power to challenge that classification, although in fact since there was no law, since it was executive regulation, of course, it did.

In short, there must be the possibility of questioning the validity of any mark and the motives of it. We haven't discussed that, but I could go into it.

You know, having one last footnote on my case, at this moment, the State Department has refused to assert that four volumes of the Pentagon Papers which I had released only to Congress, the negotiations contacts, must still be regarded classified, along with half a dozen other volumes that were in my case.

The fact is that the Government, by putting those volumes in the indictment, made it part of a process which I am glad to say is still a public process, so those documents in the courtroom became available to every newspaperman who wanted to look at them and make stories on them and copy them exactly, and yet they are still regarded as top secret. They cannot be published without saying they are violating the classification statute.

Nothing could exhibit better that classification is forever.

Senator MUSKIE. You said in your opening statement that secrets are very well kept and yet the Defense Department has reported it investigated 2,372 suspected security violations in the Washington area between July 1, 1967 and June 30, 1971.

All but two of them were for failure to protect classified information properly, but in only one case—yours—was the violation prosecuted.

Mr. ELLSBERG. So many things could be said about that. My prosecution of a leak. Prosecution of a source. I felt newspapermen have belatedly become afraid, haven't really realized the implication of the first direct prosecution of a newspaper source, although my indictment didn't allege that; didn't even allege that I had given them to Congress, but had to do with the copying process.

I did not do anything and Tony Russo did not do anything that is not done in some scale or degree by anyone who reveals official documents to the press, so prosecution is available to those, including the FBI and Defense sources, upon whom we depend for our knowledge about Watergate these days.

Which is to say that the secrets were not kept by the fear of prosecution because there had never been any and everybody knew that. They were kept, we could go into that, how they were kept:

By the fear for careers. By the fear of loss of access to this inside dope. By the fear of that.



Henry Kissinger said to a man who wanted to leave his office in connection with his Vietnam policy: "I understand that the day will come that I will have to go back to learning about events from the New York Times."

He said that with essentially a fear in his voice and with the impression, "I am reminding you of something, how can you leave these hallowed halls, be that ignorant, be out of it?" Which will happen to him, perhaps sooner in this country than it might have been.

Why then was my prosecution brought?

I do have—I don't know for sure—not because there were more papers involved than usual, because every memoirist—Schlesinger and Hilsman had always worked with more documents than I had. Their names were on the book, no investigation needed.

Moreover, we know by affidavit that general counsels in the Government had told their Cabinet superiors, who had asked them to prosecute those gentlemen, that they couldn't do it because there was no law and there was no law because such a law would violate the First Amendment. A law that kept such information from the Congress and public would violate the First Amendment, and as I say, I understand why we have the First Amendment, because you cannot have a democracy and republic without it.

I didn't know that first when I served the system. Should we change the Constitution or what should the nature of the law be?

If you ask why this prosecution was brought, I want to share with you at this moment, because it is important as to what my best guess was.

Initially, they wanted to change the Constitution, a legal precedent that would give them an Official Secrets Act as the British do have.

That is a law that would make it illegal simply to give this information to anyone per se, whatever your intent.

Gradually, as we went along, we thought that was not the only reason. We know there was no law but we didn't know the prosecution knew that.

We knew the prosecution case was very thin but we didn't know they knew that.

Judge Matthew Byrne got our rights secured by getting evidence that had been available to the prosecution—opinions—just comparable to the opinions that are kept secret in Vietnam and revealed in the Pentagon Papers—just opinions.

Without those opinions, you can't really understand the motives of the people you are dealing with, the way they are going.

We discovered the prosecution had been told, in documents by people in the Defense Department, that the revelation of the Pentagon Papers could not harm the national defense.

That was the essential charge we were charged with. I had believed that, but I thought well, that is my judgment. I thought the prosecutor, perhaps justice, thinks differently.

They had been told the same thing by a subordinate of Mr. Buzhardt, the General Counsel of the Defense Department, now in the White House.

We got thoroughly credible testimony, which I believe, although unfortunately it contradicts the sworn testimony of Mr. Buzhardt, who I am forced to infer or conclude was lying on the witness stand

when he denied this. Our testimony from the man who wrote some of these reports, Colonel Miller, now retired, was that the reports he had written had been ordered removed from the files by order of Mr. Buzhardt.

He did not get this directly but secondhand through his superior in the form of the order—"take those documents out of the file as though they never existed."

These were documents which I had a right to have as a defendant, so-called Brady material, exculpatory material.

It was interesting to discover that. They also knew that facts that their witnesses stated on the stand were contradictory to the statements those people had made to the FBI earlier.

We finally got that through this same process. All this was of great interest to me as a defendant, also as a citizen.

Why, then, had the case been brought? My best guess was this, and it was formed as a guess before the Watergate case came out.

Every disclosure so far has tended to confirm it. There was a special interest in the Justice Department and especially under Mr. Mardian, who was in charge of my case, to establish a link between Daniel Ellsberg and Pentagon Papers and Democratic candidates and specifically you, Senator Muskie.

As you know, we have not had the opportunity to meet before this moment. So there is no direct link. However, the Pentagon Papers were donated for safekeeping to the Rand Corp. by Mr. Paul Warnke, Assistant Secretary of Defense, Morton Halperin, his deputy, and Halperin's deputy Leslie Gelb, who gave those papers more or less routinely to be stored by them at Rand.

As I know from hearsay, my understanding is Mr. Gelb was helpful to you and Mr. Warnke was likewise.

All three of them are closely associated with Mr. Warnke's partner, Clark Clifford, who again carried on the process of ending the McNamara study, of completing it.

I believe Mr. Clifford was an advisor to you. There was thus a very strong circumstantial case for linking the papers at Rand to your Presidential campaign through your advisors.

In fact, not one of those people knew of, had any hint of, had any after-knowledge or anything to do with the revelation of those papers, which was wholly my responsibility.

It was to make that clear to the public that I took public responsibility: Not because I wanted an indictment or publicity, but precisely because I respected these men, was closely associated with them, and I did not want them falsely to take the blame.

I revealed the papers in late 1969. First, I could not understand why my indictment was dated March 3, 1969, as the beginning of a, quote, "Conspiracy."

I hadn't had the idea myself at that time, let alone anyone else: but that was the date with the approval of Halperin and Gelb that I transferred some documents from Washington to Santa Monica.

A direct link was drawn between that process and the revelation.

Mr. Mardian set out to prove that was the advice of those men. All of this started in 1971, when you were leading the President in the public polls. Far from being a pushover as it appeared a year later, it looked as if you ran or another middle-of-the-road



Democrat ran, and Mr. Wallace ran, you would win; and also if you didn't but Mr. Wallace ran, even others might have won.

This, I say, I conjecture from my case and the questions it posed before these new revelations came out, that the process of my prosecution was brought as part of a scheme to affect the primaries and ultimately the election and to reelect the President.

Everything that has come out since confirms that: The supra-legal methods used in the White House with respect to me. Others are now still rationalizing the plumbers as trying to discover and plug leaks. But look closely at that.

Mr. Hunt was hired on July 6, more than a week after I had been indicted and had revealed myself as the source of those leaks.

It was hardly needed to establish that leak to me.

On the contrary, that leak was an opportunity to them, not a threat. What did Mr. Hunt do?

He set out to do a psychological profile. He interviewed all my girlfriends—I was not then married—simply to smear me in what he called prosecutability, in other words, could I be made a mudball who could stick to a Presidential candidate?

I wasn't unpopular enough, I looked too patriotic. So my psychiatrist's files might be something to help.

As we know, he went to Chappaquidick, not having to do with leaks, but information that would bear on another possible candidate.

We know, of course, what Watergate led to ultimately.

We know the same team set out to assault me on the steps of the Capitol when I was giving a public speech on the steps of the Capitol to protest more bombing, and the orders of the Cubans—that had been hired a year earlier and were later found in the Watergate—were to call me a traitor on the steps of the Capitol and later to hit me. They were fought off by some rather small girls, which may explain why Castro was not overthrown.

But one final thing, these people who were supposedly so concerned about secrets and leaks, the next thing Hunt did after breaking into my psychiatrist's office, and getting a psychological profile, was to get hold of the same cables that I am indicted for revealing, the Diem Coup cables, a volume that is still classified by this administration, although it is publicly available.

Senator MUSKIE. Did Hunt have clearance?

Mr. ELLSBERG. That has not been established actually, whether he had clearance, but he had clearance to leak it; because what he did with those was to leak them to William Lambert, leak those cables because they could associate not just a past-President, the brother of a possible candidate, but—as participants in the Diem Coup, in which decisionmakers were implicated—people that I don't need to identify for you in political terms. Mr. Harriman, Mr. Ball, Forrestal, Hilsman, others, people closely associated with current political candidates at that time.

The cables weren't quite good enough for him—so with his trusty razor blade and trusty Xerox machine, he forged cables.

If we had known that during the trial—I moved. It hardly needs answering why I was prosecuted for releasing the same cables that Mr. Hunt working for the President, released in the fall of 1971, while the document was still classified. Namely, I was prosecuted to help

re-elect the President. He wasn't prosecuted because he was helping to elect the President.

Senator MUSKIE. Together we have used up my time.

Mr. ELLSBERG. Together it was a long answer.

Senator MUSKIE. It was complicated, your answer.

Senator THURMOND.

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Chairman, has the witness been sworn?

Senator MUSKIE. No; we have not been swearing witnesses in this hearing.

Senator THURMOND. If there is no objection, would you mind swearing him?

Senator MUSKIE. I see no reason to put this witness out—

Mr. ELLSBERG. I will be delighted to be sworn.

It is my pleasure.

Senator MUSKIE. Would you raise your right hand.

Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ELLSBERG. I swear to tell the whole truth and nothing but the truth about the matters we are investigating.

Senator MUSKIE. Thank you, Dr. Ellsberg.

May I say at this point that I find your earlier testimony completely credible.

Mr. ELLSBERG. I, for some time thought it would be good for this country if we heard more testimony from Government officials under oath.

Senator THURMOND. Dr. Ellsberg, I presume you are a doctor of philosophy and not of medicine?

Mr. ELLSBERG. I am even worse; I am a Ph. D. in economics. That is correct, I have a Ph. D. in economics.

Senator THURMOND. Dr. Ellsberg, why did you feel you were qualified to make the judgment as to what is in the best interests of national security as opposed to experts in the U.S. Government?

Mr. ELLSBERG. Senator Thurmond, I have been one of those experts in the U.S. Government for 12 years and I have come to have a little less respect for their expertise or their authority to make those decisions for you and the public than the 535 Members of Congress.

I came to the conclusion that you and your colleagues did have a need to know and were trustworthy. That conclusion was contrary to the judgment of my former superiors and colleagues in the executive branch.

It was a judgment I was compelled to make because my grandfathers and my grandparents came to this country to a land of freedom from another one that was then not free and is not free today.

By virtue of that, I was born here as an American citizen, compelled to consider my obligation to the U.S. Constitution; and I felt that the obligation there was not to keep this information which had been withheld wrongfully from Congress in my safe for me to draw conclusions from, but that you needed it for your purposes of legislation.

That was the judgment that I was challenged to make and which I did make.

Senator THURMOND. Dr. Ellsberg, if you felt the situation was inadequate, did not the Congress have the power to change the law and was:



not their responsibility to do that and yours to obey it as long as it was the law?

MR. ELLSBERG. As you have heard from our chairman, Senator Thurmond, Congress has not made any such law, so the challenge to me was: Should I obey an executive regulation which has no basis whatever in law? And I would hardly criticize even a Senator who was not aware of that situation, because I am well aware that it is one that was just not explored earlier.

I hope my case has helped to illuminate that.

The fact is there was no law. My problem was obeying executive regulation—of course, I was no longer in the executive—or company regulations, which I did indeed violate.

The question is: Did the company regulation have higher status than the Bill of Rights in the Constitution?

SENATOR THURMOND. Then if the Congress saw fit, it could have passed a law if it was not satisfied with the situation; could it not?

MR. ELLSBERG. Precisely. I hope that is what this process is leading toward.

SENATOR THURMOND. But you acted before Congress acted; didn't you?

MR. ELLSBERG. I thought Congress was unlikely to hold hearings like these until they were aware how much they were and still are being lied to and how much information is being withheld from them.

The Moorhead hearings began slightly after the Pentagon Papers began to be released in the press and I am assured by one member of the Moorhead committee, Representative McCloskey, that they would have been unlikely to have been started at that time except for the exposure.

This is also the judgment of Senator Fulbright who I consulted on that question.

SENATOR THURMOND. We are not interested in other people's judgment, just your judgment.

I will make the questions brief and I will appreciate the answers brief.

DR. ELLSBERG. do you feel that anyone in the Government has authority to release classified information in direct violation of the law, and if so, why?

MR. ELLSBERG. Senator Thurmond, with all respect, I must correct you.

We cannot speak of the law here. There is no law governing it and that is something we must discuss if you think that is a central point.

There is no question of discussing the law.

SENATOR THURMOND. Are you taking the position that the Government doesn't have the authority to classify information?

MR. ELLSBERG. I am taking the position that the executive branch is not the Government but only one branch of it, and it cannot make laws for Congress.

SENATOR THURMOND. And you are taking the position they had no right to classify information?

MR. ELLSBERG. No; I believe they should not be imprisoned for classifying documents. I believe they should adopt administrative regulations for their employees.

Senator THURMOND. Are you saying this Government cannot classify information which you consider of great importance to our national security?

Mr. ELLSBERG. No.

Senator THURMOND. And anyone who wishes, like you did, to expose it, can do so?

Mr. ELLSBERG. Only at the penalty of the likelihood of losing his job and his career, as I did.

That is a sufficient deterrent to keep so much information from Congress that we have paid the price of 55,000 lives for it and killed 2 million people wrongfully.

Senator THURMOND. Did you consider the possible consequences to our national security when you made the decision to release the so-called Pentagon Papers?

Mr. ELLSBERG. I considered nothing else. I believed, as I have just stated, that the consequences of concealing this information from you and your colleagues in the Senate and the House had been the price of a 28-year or 25-year wrongful war in which, it bears repeating, 55,000 Americans had been killed and 2 million people in Vietnam and Indochina killed.

That was the price. I felt, then, that I had to weigh the risks.

Senator THURMOND. We weren't interested in your opinions on the law. We all understand that. If you will answer the question I asked you. Did you consider the consequence to our national security when you made the decision to release the so-called Pentagon Papers?

Mr. ELLSBERG. I repeat, I considered nothing else: in the sense that I felt continued concealment by me of that information from Congress was likely to lead, and I change my answer now, to another million people dead, as it did lead, in fact the war did go on, the bombing still goes on. But I don't need to relate it only to what happened in Indochina. The other consequences of allowing this information to remain concealed from Congress, and thus the process of secrecy to remain hidden from you, so there would be no hearings like this, was the loss of our country as a republic.

Senator THURMOND. Are you taking the position there was no violation of law or are you willing to take the risks and pay the penalties necessary?

Mr. ELLSBERG. Both, sir. Should I address that?

My own feelings at the time were not an issue in the case there and certainly now, but it can change.

I can tell you if you are interested. I thought at that time that there probably was a law I was violating, in fact, and I would go to prison for violating that law. It was only later—certainly for the reasons I have given, the constitutional reasons and spirit, I felt it incumbent upon me to do that.

I was willing to go to prison if necessary.

I have now learned, and of course, I don't ask you to take it on my word, only as one person's opinion, it is now my understanding that no law was violated. The reason for that—we can explore that to any length you desire. I will be happy to.

Senator THURMOND. Well, the law states—

Mr. ELLSBERG. As someone—you are close up.



Senator THURMOND. At the time you thought you violated—at the time you did it, you admit you thought you violated the law, but you were willing to take the risk?

Mr. ELLSBERG. I thought a law existed.

Senator THURMOND. You were willing to violate the law at the time?

Mr. ELLSBERG. I felt that a wrongful law, as I say.

Senator THURMOND. Whether it was wrong or right, you were willing to violate the law; weren't you?

Mr. ELLSBERG. That is correct.

Senator MUSKIE. You violated a law that didn't exist?

Senator THURMOND. Mr. Chairman, allow the witness to answer, not the chairman.

Senator MUSKIE. Well, occasionally a comment is useful, Senator Thurmond.

Senator THURMOND. Mr. Chairman, I just prefer to question the witness in my own way, if the chairman doesn't mind.

Senator MUSKIE. I didn't put a question.

Please proceed.

Senator THURMOND. You put an answer, not a question.

I would rather for the witness to answer the questions, Mr. Chairman.

Senator MUSKIE. I give you my apologies.

Senator THURMOND. Thank you, I will accept them.

Dr. Ellsberg, I want to ask you this question:

Can you distinguish between the illegal means you used to publicize the Pentagon Papers as opposed to the illegal means some people in government allegedly used to obtain classified information about you?

Mr. ELLSBERG. Yes.

Senator THURMOND. I will be glad to hear from you.

Senator MUSKIE. You asked for brief answers.

Mr. ELLSBERG. Do you want a brief answer, Senator?

I will make it as brief as I can.

First of all, it is now apparent, after 5 months, really 2 years of looking at the law, that I did violate no law, so that is the difference between burglary and what I did.

Suppose there had been a law, and I hope you gentlemen do not write one that would make it illegal to do what I did.

Then the difference would be between someone who revealed the truth to the Senate, so that the Senate could act constitutionally to preserve our democracy, and if it willed to end a wrongful war, whereas, the gentlemen you speak of were, I think, with good intentions in their hearts, as they saw it, but had different intentions.

Their good intentions were to discover private facts about the private lives of certain individuals in the political process, and they did so by burglary and stealth that would keep the information and use it as they saw fit, and "as they saw fit" was to destroy the democratic process in this country by direct subversion of the Democratic campaign.

I find that quite a difference.

Senator THURMOND. And you distinguish between what you thought was violating the law and the fact that someone else tried to obtain information about you in violation of the law?

MR. ELLSBERG. I distinguish in the way I described. I do not think that I should be judged nor the Nation be judged either, as being above the law or as being judged only by their good intentions.

I think most bad acts are done in the world with intentions seen as pure to the person doing it.

I describe instead the kinds of actions that were involved and objective assessment by a jury, and I think that would be most appropriate in the current events as it was in mine of the judgments involved, an objective assessment of the alternatives.

In short, Senator, let me say, it is not in the last 2 years that I have had any fantasy of being beyond the law.

On the contrary, I have spent 2 years in and out of court, without complaint as to the right of the executive branch to challenge my actions and to see that they are tested by a judge and a jury of American citizens; as they have been until the criminal behavior of the Government brought the proceedings to a halt. Without any complaint on the principle of doing that. I was happy to have those actions judged.

I have been subject to the law for those 2 years. And I now believe that the people, not only who are caught in the Watergate, but the people who ordered them, knew of their existence and their actions and concealed all of that from the American public, must, like myself, and I include in this, the President, Mr. Nixon, must be presumed innocent until proven guilty in a court of law.

And I believe it will be for the good of the country if all of them have their day in court, have their opportunity to testify under oath as I am now doing before the Senate, and ultimately before a court stenographer, and that the truth is arrived at in that fashion one way or another.

SENATOR THURMOND. Now, on what basis was your case discontinued in California?

MR. ELLSBERG. On the basis of a long, really 2-year pattern of prosecutorial misconduct which proved to be executive branch misconduct involving nearly every national security department, not just Justice but the CIA, which is not a department, of course, the Defense Department, to some extent, the State Department, and certainly the White House.

In every step of the prosecution it had been carried on by illegal means and denied fundamental rights of myself and my codefendant, Anthony Russo, in a way, indeed, I have been saying, that suggested motives that had nothing to do with law enforcement but strictly political motives.

The judge did not make that inference. He merely observed that the Government by its actions had acted illegally and acted in a way to totally destroy the rights of the defendants and it had to be brought to an end.

Judge Matthew Byrne found executive government guilty of the three counts in my own indictment, guilty of conspiracy, burglary, and espionage.

SENATOR THURMOND. You mean the prosecution, don't you; not you?

MR. ELLSBERG. Yes.

SENATOR THURMOND. Therefore, your guilt has not been determined, has it?



MR. ELLSBERG. On the contrary, I have been subject to questioning by a 2-year process by the executive branch.

That is now terminated. The trial is not merely declared a mistrial. The charges were dismissed.

I am no more subject to charges of wrongdoing legally than you are at this moment, Senator Thurmond.

SENATOR THURMOND. On the other hand, though, your guilt has not yet been determined, on the cause or the method of the operation of the prosecution, the judge threw the case out; is that a fair statement?

MR. ELLSBERG. I am sure I have been guilty of things of my life—

SENATOR THURMOND. I understand my time is up. I will come back to you in a few minutes.

MR. ELLSBERG. I will be delighted, Senator.

SENATOR MUSKIE. Dr. Ellsberg, as I understand, you and I and Senator Thurmond are all innocent until proven guilty, I assume.

SENATOR KENNEDY.

MR. ELLSBERG. We know otherwise.

SENATOR KENNEDY. I yield.

SENATOR MUSKIE. Senator Chiles has been here all morning.

SENATOR CHILES. Doctor, you did in your statement in answer to questions recognize there is a need for secrecy in Government.

I think you gave us the premise that you felt much of the present problem arose from World War II in the Manhattan Project at the time we were trying to carry on a battle with Hitler and the Japanese at that time, who were our common enemies.

Of course, this is the grave problem in democracy, how we follow our Constitution in Article I, and at the same time how we can try to protect ourselves from closed societies that don't have the same articles that we do.

As I understand, you think we need a law that would set up how secrecy would be handled?

MR. ELLSBERG. In the expectation of cutting it back very greatly and monitoring it.

SENATOR CHILES. What role should the courts play in regard to secrecy?

MR. ELLSBERG. I think that not only Congress, along with the executive and very importantly the press must monitor this process.

But I would say that the expectation or provision for judicial review must be written into the law. There have been a number of cases in which the question of classification has arisen in court, and to my understanding all cases prior to ours—there might be a few cases I am unaware of—the judge has taken the position, "I am in no position to judge this despite the claims of the defendants."

This has prejudiced a number of cases against defendants.

I believe that even the administration of the Freedom of Information Act to some extent runs across this.

It simply excludes from the provisions of the Freedom of Information Act the provision of secrecy. It is an enormous gap and should be closed, but it has also had the effect on courts of a judgment by Congress that the courts should not address this question, the Congress should not—where I believe the original intent was they did not choose to do it in that particular act.

I think they should make it very clear to the court that there is a statutory basis for the claim that certain information should be released if it is improperly classified.

Senator CHILES. You are also talking on the multiplicity of classifications themselves, which have heretofore not been revealed even in the classifications above top secret.

There is a need, is there not, to have some information declassified on some sort of a need-to-know basis rather than just general broad classifications?

Mr. ELLSBERG. Yes; but if I may repeat, I would be suspicious in the extreme to the point of total intolerance of the claim that there is information that cannot be revealed to any Member of Congress: in other words, the line cannot be drawn between the White House and the Congress safely.

I think Watergate shows us this: it is really the same phenomenon, shows us in a way that citizens and Congressmen can recognize because it is in the domestic sphere.

The need is the same when they are not Americans. The victims are always the democratic system and American lives.

So I am saying—for example, a sample law that I discussed would be a very simple one: that it cannot be a criminal offense, cannot be a subject of prosecution, to give information to a Member of Congress.

Addressing Senator Thurmond's question, I believe that no one should be prosecuted—prosecuted now for handing in a sealed envelope, Senator Thurmond, anything in the way of information. That doesn't mean that his job has to be secure, a clearance has to be secure.

Those are administrative penalties that are more than effective; that have been dangerously effective in keeping secrets from us.

It does mean, though, that prosecution should not add to that deterrent.

Senator CHILES. You would not argue that the First Amendment protects your job against administrative action?

Mr. ELLSBERG. It is hard to say that.

Certainly in a corporation, Congress should not be making rules about that.

The Rand Corp. had every right to fire me, and, in effect, did.

Certainly, there was no complaint by me. But the executive branch of the Government, you raise another question now; should Congress tolerate this system even as an administrative system?

I think that judgment has to be made by looking at the effects of doing so and the nature of the executive branch.

As I said, I think that that secrecy so corrupts our officials, only one of whom in the executive branch has ever been elected—so corrupts them so dangerously, it leads almost inevitably to such abuse that I think that, even as an administrative system, Congress should take a strong concern in this and cut back those rules; should insist, for example, that there be appeal within the executive branch, if there is not now, should insist that someone should not be fired if he takes the burden of the risk by himself like Ernest Fitzgerald, and reveals something to Congress that would embarrass his bosses.

In other words, even as an administrative system, I believe it threatens our Constitution as the system is now run.



An administrative system would be possible, I believe, that could exist with democracy, but to do that, you can't leave it to the executive branch to define it for you.

Whatever they tell you about it, Congress must investigate it, make laws for that administrative system, and keep it in constant check.

Senator CHILES. Why were the Pentagon Papers stored at the Rand Corp.?

Mr. ELLSBERG. Well, they were stored in various places, you know.

When the copies were completed, there were about 15 copies. my current memory is 12 of them went to private individuals, former officials, Mr. McNamara, Clifford Warnke, Katzenbach, William Bundy, and so forth.

Senator CHILES. Why did they go to these individuals?

Mr. ELLSBERG. Because it was regarded as just a history and one which covered events in which they had taken part.

There was a practice—we weren't able to identify much about this at the trial, but Moorhead has heard a lot about this, of course.

Senator CHILES. What requirements would there be about how they would store those papers, top secret?

Mr. ELLSBERG. This letter was sent out from the Defense Department under Mr. Buzhardt and Mr. Laird, of course.

No restrictions were placed on where they would store them, no restrictions on where they would put them.

Senator CHILES. Weren't there general restrictions on all top secret information?

Mr. ELLSBERG. According to Mr. Florence, for all practical purposes, and even spirit, those documents had been declassified when they were sent out to a dozen individuals.

In other words, they should have been declassified, obviously.

Senator CHILES. Do you know whether the documents that were sent to them were stamped "Top Secret"?

Mr. ELLSBERG. They were stamped "Top Secret," because a document stamped top secret almost never gets stamped another way, even when they are 25 years old.

Senator CHILES. Do you know whether they had to respect the documents and sign some receipt as to how they would handle the documents?

Mr. ELLSBERG. My best understanding is there were receipts for possession of the physical document, but they did not sign any commitment whatever as to what they would do with them.

I could only say what we did learn in the last 2 weeks that bears greatly on this question of why the prosecution.

We were given them a year late, a year after court order has asked for FBI reports on Rand officials, interviews of Rand officials: material that we were entitled to by the prosecution.

We got this in the course of cross-examination of the president of the Rand Corp., so late we couldn't really affect our cross-examination.

What we found out was quite startling, namely, the FBI agents had come to the Rand Corp. in late April, April 27 of 1970, to the security officer.

They told them they had reports and which evidently were correct, that I had copied top secret documents, and had given them to Senator Fulbright and Senator Goodell.

I had not given them to Senator Goodell, only to Senator Fulbright, but quite accurate information.

They said that from Rand.

Next they saw the president of Rand a couple of weeks later, or about a month later, and discussed this with him.

Now, we became aware in the mid-trial that the FBI had known about this.

We didn't know precisely what they had done. Remember, this is more than a year before the Pentagon Papers came out in the newspapers, more than a year the FBI had these reports.

I left Rand as a full-time employee April 15, before the FBI came, but I stayed on as a full-time consultant until September 30, about 4 months.

During that time, I had my top secret clearance, I had a top secret safe, I continued to check out top secret documents.

As we gradually, as I say, became aware that the FBI had this interest, it became very interesting how this happened, and the answer was in one of the FBI interviews.

It was the judgment of the officials of Rand, not contested by the FBI, that the interests of national security were consistent or not inconsistent with my continued access.

Now, to be fair, that was in the assumption that the FBI would pursue the prosecution probably in some way.

But the question was, as they pursued it, is it dangerous that I continue to have top secret documents as I did on the study?

The judgment they arrived at was it was not, and, as I say, I did continue to take them out. And the reasons they gave to the FBI were these:

First, a lot of it was in my head, which was true.

Second, however, these were histories: correct.

Third, and a very interesting one in terms, I believe, of the question of Senator Thurmond earlier, third, since they had gone to the Senate, at most an impropriety had occurred, not espionage, even though I had had to have the help of others who didn't have clearances to help me copy them and physically get to the Senate.

The judgment was made by the president of Rand to the FBI. Senator Fulbright could obviously have gotten this information, had he asked for it, and therefore, nothing too serious has happened if he has been given it.

This didn't mean that I had done nothing wrong, but nothing so urgent that would require me to be cut off access or to be informed, and I wasn't. It was a statement.

Senator Fulbright asked formally from Secretary Laird the first working day after I spoke to him in the fall of 1969, a year earlier.

He asked for those studies by name, title, date.

The answer he got back in writing from Secretary Laird didn't even mention executive privilege, and certainly didn't mention classification since Senator Fulbright is cleared.

It said, "It would not be in the interest of the country for me to give you this information," the information which now can be read by anybody in court.

Senator Fulbright asked four times in writing for that study from the Secretary. It was denied each time, never with executive privilege



even being formally invoked, thus I would say, confirming my judgment, that the only way the Senator would get that information was for me to copy it and give it to him.

Senator CHILES. That is all.

Senator MUSKIE. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I want to welcome Mr. Ellsberg here. I regret I was not here for his opening statement, but I look forward to reviewing it.

Mr. Ellsberg, you surely know that the Senate, and most particularly the Judiciary Committee, is considering the process surrounding the investigating and prosecuting of the broad conspiracy that you have referred to.

Have you been able to be objective at all about the current state of the Justice Department? To what extent can we rely on the Justice Department, based upon your own experience and observations of the period of the last couple of years?

Mr. ELLSBERG. Well, in the last couple of years, my contact with the Justice Department was primarily at a very low level. The assistant U.S. attorney—it was very evident as we went on that Mr. Nisson withheld testimony, withheld witnesses—Samuel Adams of the CIA had been put on great pressure of being fired because he testified under oath most recently in our trial; probably will have to leave the Agency shortly, but he kept the existence of Mr. Adams from us, withheld certain documents proving our innocence, and wiretap data going back years.

We were not able to judge whether that was just the prosecutor or represented higher authority, although it became evident such people as Mr. Buzhardt became equally culpable in concealing some of this evidence, when Mr. Buzhardt was put under oath and I am afraid did not take that responsibility seriously in court.

Senator KENNEDY. Am I correct, he is the one that has just been sent over to the White House?

Mr. ELLSBERG. You are correct.

Senator KENNEDY. Would you tell a little bit more about his involvement?

Mr. ELLSBERG. As General Counsel for the Defense Department to provide opinion to the prosecution and on the issue of whether the national defense had been harmed by the release of these papers.

This was, of course, an essential legal issue in this case, and not one to be decided by you or me or any other individual.

It was a matter of judgment. Under Buzhardt and Buzhardt's deputy, Colonel Miller and Mr. Gerhardt were told—a panel was convened and set to work on this.

This was done quite fast because several of them had worked over the Pentagon Papers before. They provided reports. Those reports we ultimately learned said—and in Colonel Miller's case in the Office of Security Review—none of the volumes presented to him could have harmed the national defense.

In the case of Mr. Gerhardt's report in Buzhardt's office, he could not conclude that with regard to all 20 exhibits, only 13 of them. But the fact that, in writing, the Justice Department had been supplied, a year earlier than we demanded, written opinions that 13 of the volumes and in another case a larger number could not have harmed

the national defense, that was wrongfully withheld from us despite court orders.

Mr. Buzhardt was part of that. We had sworn testimony that a witness had been told by his superiors as follows:

Mr. Buzhardt—that person's superior, Mr. Buzhardt—has said: Get those reports out of the files as if they never existed.

I have a feeling that Mr. Buzhardt——

Senator KENNEDY. Where is Mr. Buzhardt now?

Mr. ELLSBERG. He is in the White House looking into the Watergate conspiracy.

Senator KENNEDY. Do you find that troublesome at all?

Mr. ELLSBERG. I feel that I can understand why he was selected for the job.

In fact, if the President had asked me, I would have had to recommend him.

But you ask about the Justice Department in general. Let me make one more observation I learned as a defendant that was very startling to me.

The second time that another Defense Department employee gave sworn testimony contradicting highly credible testimony on the stand—as far as we could tell, lying—I turned to my lawyer at the defense table and said—the judge had told this Defense Department employee, the judge said, “You are reminded, you are still under oath.”—I turned to my lawyer and said, “That isn't the issue. The issue is: Does he understand what that means?”

And my lawyer said quickly, “He knows that he will not be prosecuted whatever he says; that he is a Government witness.”

At that time, as an American citizen, I became aware of a quite unnerving discovery that prosecutors, prosecutors who work for the Justice Department are required to get an indictment, or are necessary; and to be tried for perjury you have to anger or in some way cross a prosecutor; and they all work for the President.

This is what we are encountering in Watergate, because the lines go to the White House.

I can say to you finally, as a matter of fact, the sworn testimony given to this court by White House officials, including Mr. Ehrlichman, Mr. Hunt, Mr. Krogh, former officials, contain on their face great discrepancies, great inconsistencies by everything else known to us now, contained in inaccuracies or lying.

Now, whether they knew they were lying is not a frivolous question. It is now the Senate investigation. Now put these people under oath and explore the inconsistencies including the statement that there was no knowledge by anyone that there was wiretapping, that is including Mr. Ehrlichman, who had in his own safe, knowledge in his own safe.

He chose not to reveal that. He faced the same decision, Senator Thurmond, if I may say, the same decision that I had with respect to material in my safe, evidence of misconduct.

Senator THURMOND. Who are you talking about now?

Mr. ELLSBERG. Mr. Ehrlichman. He had in his safe the wire-tap logs which, in obstruction of justice, had been kept from the Justice Department, and were of questionable legality even in the beginning.

He had the same problem, loyalty to a boss, executive regulations and classification, because those were covered by classification.



He faced as I did the question: Is loyalty to a boss higher or not than loyalty to the constitutional process of justice or politics in this country?

I made one decision on that. Mr. Ehrlichman made a different one.

Each of us, to obey the regulations, had only two things we could do: the regulations now, not the laws.

We could keep our mouths shut; or we could give the information to the appropriate executive official, the Attorney General, Mr. Mitchell, in my case.

I put it to you as legislators that that is not an adequate set of alternatives for an official in that position to face for the protection of our democracy.

Right now, like it or not, Senator Thurmond, you and your colleagues rely for crucial information upon the conscience of executive officials who are willing to give their jobs and careers to give you the information you need to legislate.

We need not thank them for it. That is their problem and their challenge, but that is where we are now.

The challenge to you is to change that situation where the Government is better protected and where our rights by the people are protected and my rights as a defendant do not depend entirely on Mr. Ruckelshaus' arm wrestling with Secret Service people over information that I have the right to have.

If it is going to be a trial by ordeal, I would rather do it myself.

Senator KENNEDY. The point that you mentioned earlier about the prosecutors prosecuting those who may be involved in this whole conspiracy points out the tremendous responsibility as well for the Senate as it sets out to define the relationship between an independent prosecutor and the Attorney General.

I think you have outlined here in your response the need for that as applied certainly in your particular case.

We have often heard that the general public does not really care a great deal about the Pentagon Papers or about the Watergate case.

I noticed in the newspaper the other evening that you had a chance to talk with the jurors who sat on your case.

Could you give us any impressions you gathered from them about their sensitivity to these issues?

Mr. ELLSBERG. We spoke to only a few of the jurors—no, I am sorry, we spoke to a majority of the jurors, but not to all of them.

Of course, in a couple of days they came to a party. We have heard taped interviews of some of the others.

Three things: As I mentioned earlier, before you were able to come, I was very impressed with their astuteness and shrewdness, and I was not surprised, by their filtering truth from fantasy as they heard it on the witness stand.

All the cases known to us as involving untruthful statements, I would say they spotted them faster than we did.

That is reassuring in the jury process.

On the question of the issues, it was very gratifying to me to learn that the minds of some of them had been changed very sharply in the course of the case.

I think like most Americans, they started the case assuming that Anthony Russo and myself had broken the law.

As I say, I started with that assumption myself. So they assumed in effect, like it or not, that we were guilty before we started.

Not only did they learn better about the law, but hearing the Pentagon Papers changed their mind politically, very significantly, several of them told us.

That is reassuring to me. I have obviously acted not only on the belief that the American people were trustworthy and had a need to know, but that they wanted to know if they had the opportunity.

This jury reassured me on that problem.

Senator KENNEDY. Just a final couple of questions:

As I understand the basis for the classification, Executive Order 11652, section I, requires protection of material through classification if it falls in one of three categories depending on degree of significance to national security.

No other category should be used to identify national security classification unless otherwise expressly provided by statute.

Do I understand that you testified earlier there were a number of categories, approximately 12?

Mr. ELLSBERG. No; I said along about 12 and two or three were described as need-to-know lists or access lists, but a number of which are quite properly described as fully formal clearances, separate background agencies, separate investigations, separate couriers, and everything else.

Senator MUSKIE. Would the Senator yield?

Senator KENNEDY. Yes.

Senator MUSKIE. Were those classifications as to subject or broad areas?

Mr. ELLSBERG. Some are subject. You have heard in the papers just the other day of so-called Comint or communications intelligence.

That deals with, of course, the output, the result, as a former official used to call it, of opening other people's mail or listening to electronic communications.

Other categories have to do with the process of getting information.

We have been hearing about, say, bugs versus electronic wiretapping, for example. There is a very topical thing, in fact that you might well be aware of.

I take it for granted, without having had the clearance, that domestic wiretaps are covered by formal clearance.

You recall CREEP had the word Gemstone on it, a word I never heard, but that has the ring of a code that would identify information received from a particular source.

I would guess, then, these clearances are quite formally held by a number of people, handled by special messengers, and special need to know, and that accounts for something that comes back to the Justice Department, ability to handle that information.

An official in the Justice Department who did not have this clearance—I would like to illustrate this—an official who was not cleared for Alpha or Gemstone would not know therefore, if he was asked by Judge Byrne or any other judge: "Do you know of any illegal wiretapping," he could truthfully say he did not.

On the other hand, an official who did have it, having been a party, would deny it.

Now, what that does to defendants: We must have received assurances from every level in the Justice Department that I had not been overheard.



They would say, "We find no record of it."

The judge who says, "I don't care what the record shows, I want the facts."

They had been told there had been no wiretapping. Now we find 17 people—let's say 13 officials—were overheard and their logs were there in Mr. Ehrlichman's safe.

These were not recorded or logged in the Justice Department.

What logs would be recorded were in the Justice Department and moved to the White House.

Do you know what that means to those 17 people? Had any one of them asked for wiretap evidence, they would have been told: No record occurred, no wiretapping, no log.

That involves Mr. Ehrlichman, and the New York Times said today, Mr. Nixon had asked for this wiretapping and had received the product of it.

The Chief Executive was directly involved in lies to a Federal judge repeatedly on the existence of wiretaps involving the defendant in this case.

Senator KENNEDY. During the course of the confirmation hearings on Mr. Gray, he indicated to the Judiciary Committee that there were no taps on a newsman or any staff personnel. He said that in response to a particular question asked him; your comments on this particular area are most interesting.

Is it your impression that those super classifications are legal or illegal, given the words of the statute?

Mr. ELLSBERG. As we were discussing earlier, no classification has any statutory basis whatever with the possible exception of classifications that relate to the Atomic Energy Act, classifications usually known as restricted data, and the statute dealing with communications intelligence does not on its face talk about classifications, but I think classifications in that case could be fairly said to be derived from the statute.

However, that doesn't apply to illegal wiretapping.

Senator KENNEDY. Just finally, as I understand, did you sign a contract about observing classifications when you went to Rand or within the Federal Governments?

Mr. ELLSBERG. Both. Contract is not quite the right word, but a promise is correct.

Senator KENNEDY. Have you copies of those agreements?

Mr. ELLSBERG. I could easily get them for you.

Senator KENNEDY. Could I ask, Mr. Chairman, that they be included?

Senator MUSKIE. Yes.

Without objection, they will be included in the record and received.

[See Appendix, Volume III of these hearings, Secrecy in Government, Part 2, Security Agreements.]

Mr. ELLSBERG. We had a good deal of discussion and Mr. Florence here helped write a number of those promises and regulations, a great expert.

Senator KENNEDY. How were they enforced?

Mr. ELLSBERG. They have been enforced in the only legal way they could be enforced, by administrative penalty: by removing the safe from your rooms, or you have to go to a top secret library to get stuff if you leave your safe drawer open.

But ultimately by firing you and beyond that by losing your clearance.

To lose a clearance is not the same as losing a job. It is to lose a career.

Every job I have held in my professional life, and I include 3 years in the Marine Corps, every job required a clearance. That is to say I was well aware in choosing against that system I was shutting myself off from any of the areas I had been employed in all my life.

That is a significant deterrent for many people.

Senator KENNEDY. Thank you very much, Mr. Ellsberg.

Very helpful comments this morning.

Senator MUSKIE. Dr. Ellsberg, just one or two questions, and then I will yield to Senator Thurmond again.

You talked about the restraints that protect or inhibit people from disclosing classified information which they hold.

In legislation sent up to the Hill this year, the administration has proposed now assigning criminal penalties to violations of classification.

The effect would be, as I understand it, creating statutory penalties for violation of a classification system that is not statutory in origin but rather Presidential or administrative. What is your reaction?

Mr. ELLSBERG. It becomes statutory if they pass that legislation. I have already said that I think even the administrative penalties keep far too many secrets, keep secrets that have killed—I don't mean to go through the statistics again, but many people, Americans and Vietnamese, and I think should be cut back.

But to add criminal prosecution would assure you and your colleagues and we, the public, got even less information.

It seems evident to me we have not gotten enough in the past.

There is something I should bring to your attention in that connection:

As I say, earlier administrations wanted to prosecute. They were told by their General Counsels what Mr. Buzhardt, I guess, did not tell Mr. Nixon, that they couldn't do that because there was no law, and any such law would be unconstitutional.

Why, then, did they go ahead with this?

As I have suggested, mainly for political reasons, because as the prosecution came out, it could serve to blacken one or the other opposition candidate, because as I gave the impression, it was only you and/or the other, but they also wanted to win the case.

Earlier counsel had told them the Supreme Court would overthrow any such verdict; it was clearly unconstitutional.

I have to say the current Supreme Court might not know it was unconstitutional, and let it stand, and thus our Bill of Rights would have changed.

Senator MUSKIE. You were tried under the espionage statutes?

Mr. ELLSBERG. And the conspiracy and theft.

Senator MUSKIE. The espionage statute seems to require that the Government prove an individual disclosed material improperly with intent to damage the security of the United States or to aid a foreign power; now is that test of intent to harm a good one?

Mr. ELLSBERG. It is a good one and unfortunately is not quite true as we now know, as it applies to every part of the Espionage Act.



I believe the act should be changed by you and the House, the Senate in general, should be changed in certain respects. It is ambiguous in certain respects.

It seems to be the clear intent of Congress in passing this legislation, either to require the intent to harm the United States or aid a foreign power or the reason to believe this could happen, and this does occur repeatedly in the statute.

However, it does not occur in connection with documents. It concerns information. But it doesn't occur in respect to documents.

I believe that is a hole in the law which is now noticed by the administration, and the same intent should be attached to documents as well, to make it apply to espionage. The act has been used many times, but only against espionage.

The first times the act was used without espionage—only with violating this provision of the espionage statute—related to documents, because of that absence, “reason to believe.”

We discovered every prior indictment even involving documents had specified reason to believe or intent, national interest could be harmed, even if the law if you read it literally did not require that for documents.

The reason is obvious; otherwise any judge or appellate court would have found the law unconstitutional.

To avert that challenge they put that in, and it was in the judge's instructions to the jury as well.

Ours was the first case in which they had experimented with a prosecution that did not allege that.

Thus if I may return to Senator Thurmond's question now:

As the law stands, I could not say to you that I definitely violated no law.

In terms of the literal letter of the law, I could reasonably, as the law now stands, within a reasonable range of interpretation have been found guilty because of this lack of explicit requirement of intent.

I could have been found not guilty for many other reasons. They found intent not an element, but just the handling of documents; which should be corrected.

I will summarize my understanding of the law. I am not a lawyer but I have had extensive education and am passing it on very quickly.

My understanding is this: summarizing on the espionage, conspiracy and theft, the conspiracy to defraud is a very unusual law to be used.

I noticed Mr. Mitchell has mentioned it against me. None had ever been used to control information before, ever. They had never tried to do that.

Second, the prior interpretation of the law was clear. The prior application of the law was clear. By prior application and interpretation, my acts which I admitted taking as acts had violated no law.

However, the letter of the law permitted a new interpretation. For instance, the judge could not only have held that information can be stolen even though the owner, if you determine who the owner is, is not deprived of the information, which is the usual test of theft.

They could have done it. He could have decided that giving infor-

mation from one branch of the Government to another is theft, even though that is even a little more bizarre.

He could have decided the law does not require reason to believe or intent and the national defense has been harmed.

If he had done that, the interpretation and application of the law would have changed. There would have been new laws where they didn't exist before, without benefit of the Congress. And the act that you speak of would be unnecessary.

The administration would not have had to come to you. They would have had the precedents they needed of newsmen and Congressmen, starting with Senator Gravel; he could definitely be charged with the same thing as Anthony Russo.

So the law could have been changed.

I would put it to you as a citizen, you should change it by changing the language of statutes, clarifying the theft and the Espionage Act and cutting back on the classification system.

Senator MUSKIE. I believe that there is that connection between your case and these legislative recommendations that we received this year, and I thought it was useful to put it in the record.

Senator THURMOND.

Senator THURMOND. Thank you, Mr. Chairman.

Dr. Ellsberg, I am glad you admitted that there was a law and that you were prosecuted under that law, section 793; that is the law you are charged with violating; isn't it?

Mr. ELLSBERG. Yes, sir.

Senator THURMOND. Would you tell us, too, are you familiar with the decision handed down by the three-judge court in the New York Times case where it was held that the President had authority to issue Executive orders on national security classification?

Mr. ELLSBERG. Of course he does. You have not heard me contradict that, Senator.

Senator THURMOND. As the law, either a statute or court decision? They are both laws; aren't they?

Mr. ELLSBERG. The answer is absolutely not, Senator Thurmond.

Senator THURMOND. You are wrong; aren't you?

Mr. ELLSBERG. Senator Thurmond, I am astounded that you are under the impression that the President of the United States, as Chief Executive, has power to pass criminal statutes.

You are honored in being one of 535 people who can do that. The President is not one of them.

Not by bill of attainder or any other could he subject a person to regulation, or because he doesn't like the color of their face.

Senator THURMOND. Everybody knows the President can't pass the law.

Mr. ELLSBERG. Then we agree.

Senator THURMOND. A law is a statute or court decision, either one is law; is it not?

Mr. ELLSBERG. Yes, sir, but—

Senator THURMOND. How do you understand the decision of the three judges in New York, which stands that the President had authority to issue Executive orders on national security classification?

Mr. ELLSBERG. Municipal authorities have full authority to pass parking regulations, but that has nothing to do with espionage.



The Espionage Act does not have the word, classification, in it, the parts of the 793 statute under which I was tried, do not have the word classified, secret, confidential, let alone any of these other code words that are too high-flown for you gentlemen to be entrusted with by the President and have nothing to do with espionage.

The effect of my being tried under the Espionage Act is really to exhibit an attitude by the executive branch that is quite fundamental and is what I was describing earlier: That the public is for practical purposes the enemy, from whom information is to be withheld; that giving information from the Executive to the Congress is something like espionage and therefore it is appropriate to use counter-espionage tactics against that flow of information to the public, and for that reason we bring CIA agents home from Cuba to use their arts on the American citizens.

Senator THURMOND. You were tried under the Espionage Agent Law?

Mr. ELLSBERG. Yes.

Senator THURMOND. And did not the three-judge court hold that the President had authority to issue Executive orders on national security classification implied from the espionage statutes and these are the espionage agent—

Mr. ELLSBERG. No, sir: with all respect, that is your mistake.

Senator THURMOND. How is that?

Mr. ELLSBERG. With all respect, if I must say, that is where you are mistaken.

Senator THURMOND. Where is it a mistake?

Mr. ELLSBERG. The mistake is the authority in no slight degree refers to or is based upon any statute including the espionage statute and the Supreme Court in no way linked the two.

Senator THURMOND. The three-judge court implied it from the espionage statutes. A lot of times statutes don't go into detail and that is the reason you go to court. If the statutes were always clear and there is no question, you wouldn't be in court very many times.

It is construing these statutes. The three-judge court construed these statutes and said the President did have authority to issue Executive orders on the national security classification implied from the espionage statute: is that not right?

Mr. ELLSBERG. I may have erred in what case you are talking about. Would you remind me?

Which level of appeal? I was thinking of the Supreme Court. I am sorry. I may have been mistaken.

Which court decision are you speaking of?

Senator THURMOND. Three judges say that in the opinion in New York—

Mr. ELLSBERG. In Washington or New York or the Supreme Court?

Senator THURMOND. In New York, three-judge court in New York.

Mr. ELLSBERG. I apologize, sir. I do not remember the details of their decision. I remember the Supreme Court—

Senator THURMOND. I wanted to bring out there was a statute; the statute has been construed and there is the law.

Mr. ELLSBERG. That is not the law, sir, and should not be and I hope you will not make it so.

[The following material was subsequently supplied for the record by Senator Thurmond:]

U.S. SENATE,  
COMMITTEE ON VETERANS' AFFAIRS,  
Washington, D.C., May 24, 1973.

Senator EDMUND MUSKIE,  
Chairman,  
Subcommittee on Intergovernmental Relations,  
U.S. Senate

DEAR SENATOR MUSKIE: At the May 16, 1973, hearings on governmental secrecy, I questioned Dr. Daniel Ellsberg concerning the President's authority to issue Executive orders on the classification of national security matters.

The testimony shows that I referred to a three-judge court in the New York Times case where three judges expressed the view that the President had authority to issue executive orders on national security classification.

I should have said that three justices of the Supreme Court, in their dissenting and concurring opinions in *New York Times Co. v. United States*, 403 U.S. 713 (1971), express the view that the President does have the authority to classify information. Specifically, I speak of Justices Marshall, Stewart, and White.

Attached is a memorandum from the American Law Division of the Library of Congress Congressional Research Service which examines this matter and points out that various statutes afford a basis to justify such an Executive order. I will appreciate your inserting this analysis and letter in the record of the hearing.

With best wishes,

Very truly,

STROM THURMOND.

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THE LIBRARY OF CONGRESS,  
CONGRESSIONAL RESEARCH SERVICE,  
Washington D.C., April 25, 1972.

From: American Law Division.

Subject: Executive Orders Classifying Government Documents and Related Matters.

Reference is made to your inquiry of April 24, 1972, requesting information on the above subject. Specifically, you ask for information regarding the President's authority to issue Executive orders, generally, and, in particular, his authority to establish a scheme for classifying government documents.

Despite vast amounts of literature on the subject, the courts have rarely considered the limitations of Executive power. When drawn into question, the courts, particularly the Supreme Court, not infrequently seize one of "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346 (1936). Avoidance of the constitutional issue, particularly, in clashes between the departments of the government, is largely prompted by the realization that "[c]onstitutional adjudications are apt by exposing differences to exacerbate them." Frankfurter, J., in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 593, 595 (1952).

*Youngstown Co. v. Sawyer*, *supra*, represents, perhaps, the most notable instance of a decision limiting presidential action. In that case, the Court held that the Executive Branch lacked the power to seize the nation's steel mills in order to prevent a strike which assertedly would have adverse effects upon the conduct of the Korean war. The case provoked six concurring opinions and one dissenting opinion. Among the former was an opinion by Mr. Justice Jackson which pointed out that the President has varying powers depending upon the circumstances. In his words:

... Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be



supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

See *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), where the court employed Mr. Justice Jackson's analysis to conclude that the affirmative action program known as the Philadelphia Plan was within the implied powers of the Presidency.

. . . When the Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive Branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests. In the case of Executive Order nos. 11246 and 11114 three Presidents have acted by analogizing federally assisted construction to direct federal procurement. If such action has not been authorized by Congress (Justice Jackson's first category), at the least it falls within the second category. If no congressional enactments prohibit what has been done, the Executive action is valid, particularly is this so when Congress aware of Presidential action with respect to federally assisted construction projects since June of 1963, has continued to make appropriations for such projects. We conclude, therefore, that unless the Philadelphia Plan is prohibited by some other congressional enactment, its inclusion as a precondition for federal assistance was within the implied authority of the President and his designees . . . Id, at 171.

In the view of one commentator the case of *The Pentagon Papers* is understandable only with reference to *Youngstown Co. v. Sawyer*, *supra*, Junger, "Down Memory Lane: The Case of the Pentagon Papers," 13 Case Western Reserve Law Review 3 (Nov. 1971). He states "that the only principle accepted by a majority of the Court [in *New York Times Co. v. United States*, 403 U.S. (1971)] was that the Executive lacked the inherent power to impose, without legislative authority, prior restraints upon the press so as to prevent the publication of news which allegedly would have adverse effects upon our war in Southeast Asia. And this principle seems to follow *a fortiori* from the holding of *Youngstown* that the executive branch lacked the inherent power to seize the nation's steel mills in order to prevent a strike which allegedly would have adverse effects upon the conduct of our war in Korea."

The separation of powers as a limitation on presidential power appears prominently in Mr. Justice Marshall's concurring opinion and Mr. Justice Harlan's dissenting opinion in the *Pentagon Papers* Case. The former refers at two points in his separate concurrence to the fact that Congress at the time of the adoption of the Espionage Laws had refused to authorize the President powers to suppress publication of information that might be of value to an enemy in wartime. *New York Times Co. v. United States*, *supra*, at 742, 745-746. Mr. Justice Harlan referred to the earlier decision in a list of questions which he felt "should have been faced" by the Court before deciding the merits of the case. Id., at 753-755. ("Whether the Attorney General is authorized to bring these suits in the name of the United States. Compare *In re Debs*, 158 U.S. 564 (1895), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)").

Turning to the specific matter of the authority of the President to establish classifications for the protection of papers, it should be noted that the recently issued Executive Order (#11652), as was true of its predecessors, recites that

it was issued pursuant to executive power derived either from executive authority conferred by the Constitution or from statutory authority, or both. ("By virtue of the authority vested in me by the Constitution and statutes of the United States, . . .")

In its 1957 Report, the *Commission on Government Security* stated that—

Pertinent sections of the Constitution appear to contain no express authority for the issuance of an order such as Executive Order 10501 [the current order's immediate predecessor]. However, the requisite implied authority would seem to lie within article II which says in section 1: "The President shall be Commander-in-Chief of the Army and Navy of the United States;" and in section 3: ". . . he shall take care that the laws be faithfully executed."

When these provisions are considered in light of the existing Presidential authority to appoint and remove executive officers directly responsible to him, there is demonstrated the broad Presidential supervisory and regulatory authority over the internal operations of the executive branch. By issuing the proper Executive or administrative order he exercises this power of direction and supervision over his subordinates in the discharge of their duties. He thus "takes care" that the laws are being faithfully executed by those acting in his behalf; and in the instant case the pertinent laws would involve espionage, sabotage, and related statutes, should such Presidential authority not be predicated upon statutory authority or direction. Report of the Commission on Government Security at 158.

Similarly, the Commission noted that there "is no specific statutory authority for such an order or Executive Order 10501." However, it found that various statutes afforded a basis upon which to justify the issuance of the order.

The Commission's conclusions in this regard, including specific statutes cited by it to support the President's classification authority, were given a boost in some of the various concurring opinions in *New York Times v. United States*, *supra*.

Mr. Justice Stewart, with whom Mr. Justice White concurred, said that it was clear "that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *Id.*, at 729-730.

Mr. Justice Marshall said that "[i]n these cases there is no problem concerning the President's power to classify information as 'secret' or 'top secret.' Congress has specifically recognized Presidential authority, which has been formally exercised in Executive Order 10501 (1953), to classify documents and information.] See, e.g., 18 U.S.C. Sec. 798; 50 U.S.C. Sec. 783." *Id.* at 741.

Finally, it may be noted that [the President's authority in this connection receives some recognition in the Freedom of Information Act, 5 U.S.C. 522. Paragraph (b) of the Act provides that information, etc., "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," is not subject to the general rule of availability established therein. However, by virtue of paragraph (c), this exception or exemption does not apply to the Congress.]

Various prepared materials on this and related subjects are annexed hereto.

RAYMOND J. CELADA,  
*Legislative Attorney.*

Senator THURMOND. Now, Dr. Ellsberg, do you feel Congress should have all the information it requests from the executive branch?

Mr. ELLSBERG. I do.

Senator THURMOND. It should not withhold anything that the Congress requests? I believe you mentioned an instance where you said two Cabinet-level Secretaries lied to Senate Committees even?

Mr. ELLSBERG. Yes, sir; I did.

Senator THURMOND. Name them.

Mr. ELLSBERG. Rusk and McNamara.

Senator THURMOND. Secretary Rusk and Secretary McNamara?

Mr. ELLSBERG. Working for, of course, President Johnson.

I can give you the specifics if you like.



Senator THURMOND. Do you recall that in 1962, there was an investigation of the so-called muzzling of the military?

Mr. ELLSBERG. Yes, sir.

Senator THURMOND. I happened to have been on that investigating committee, and I asked that the President, at least we subpoenaed the Secretary of Defense and the Secretary was at that time Mr. McNamara, and the Secretary of State, Dr. Rusk, to be present to testify and President Kennedy wrote a letter down and said he would not permit either one of them to testify.

Mr. ELLSBERG. In my opinion as a citizen, Congress was wrong to accept that kind of withholding and should change that.

Senator THURMOND. Was Congress wrong or was the President wrong?

Mr. ELLSBERG. Congress was wrong in my opinion as in some other things.

Senator THURMOND. Do you think the President was wrong in refusing to let them come?

Mr. ELLSBERG. Yes, sir; do you not, if I may ask?

Senator THURMOND. Well, certainly, I thought he was wrong.

Now, do you not believe that the American people have as much right to hear the opinions of our military leaders on national defense questions as the civilians in the Department of Defense and "think tanks" such as the Rand Corp.?

Mr. ELLSBERG. In general terms, yes, sir. There are some different problems raised, as I am sure you know better than anyone from your past experience in the issue of the exercise of rights by uniformed military men, all of whom are subject to the Uniform Code of Military Justice and who take an oath of loyalty to the Commander in Chief.

The opinions of military men on the rights of citizens, and we have heard from General Taylor recently on that right in connection with the Pentagon Papers show a little bias from the point of view of other citizens. They are subject to a somewhat different code of laws; there are obvious military reasons for that.

I really do not criticize so much a special code of discipline for my fellow former marines. At that time I had a kind of obedience to the Commander in Chief, which I do not acknowledge as a citizen now that I have left the Marine Corps.

I believe there is a role for the Marine Corps, very much so, as for the other armed services.

But I believe it is a mistake for the President to think of himself in his capacity, particularly as Commander in Chief, as if we were all in the Marine Corps. That is the problem.

Senator THURMOND. Now, why do you think you have a superior right to release national security information while our military leaders had to bow to civilians and not be warned of the dangers of the enemy?

Mr. ELLSBERG. I do not believe that I had that right. I believe that you should have heard their opinion and I can give an example.

I read in the newspapers, thanks to Sy Hersch and thanks to his sources that in Bangkok a little while ago, about a year ago, 200 officers and men were busy not only concealing but falsifying reports of bombing of North Vietnam, reports going to the White House

and I guess that was done with some knowledge at high levels but not intermediate levels.

Finally, one sergeant wrote to his Congressman, Senator Hughes. He saw as his responsibility that the President should not be lied to, and Congress should know.

He faced the same problem I did. I think he did no more and no less than he should have when he informed Senator Hughes just as I believe I did no more and no less in informing Senator Fulbright.

It is too bad that the other 199 officers and men did not see their responsibility that way. They thought the Uniform Code of Military Justice bound them to obey their immediate superior above the requirements of the Constitution.

Senator THURMOND. Are you familiar with the fact that those at the Pentagon reduced General Lavelle in rank; they relieved him of command and he retired; you are familiar with that, and you are familiar with the fact that hearings have been held by the Senate Armed Services Committee, which Senator Hughes is a member: are you not?

Mr. ELLSBERG. Yes, sir, I was struck by the number of people that were fired as an adequate deterrent. I read of this, of course, while I was in court facing 115 years in prison for giving you that information.

Senator THURMOND. Did you ever participate in efforts to muzzle our military?

Mr. ELLSBERG. I didn't hear that.

Senator THURMOND. Did you in the light of your military posture ever participate in any efforts to muzzle the military?

Mr. ELLSBERG. No, sir; I was one of the muzzled as the military and as an executive official.

As a matter of fact, when I speak of those lies by Secretary Rusk and McNamara, which I am sure they thought was for the best for their country and the will of their commander. I have to consider—incidentally, former Senator Gruening, I told him, "Senator Gruening, when you were one of two people in the Senate—and Senator Morse had private information but not documentary proof—when you were two who voted against the Tonkin Gulf Resolution, I have to tell you I was one of very many people who knew you were being lied to, who had documentary evidence in my hands and my safe at that moment in 1964.

"I was one of those who kept that information from you and the Senate colleagues."

Now, if I was right then, then of course, as you might have it, I am wrong now.

Eight years later, some 12 million tons of explosives later, it seems clear to me that I was wrong then to have kept my mouth shut to Senator Gruening, Senator Morse, and Thurmond, and I have tried to do better.

Senator THURMOND. Dr. Ellsberg, were any of the Pentagon Papers ever transmitted in part or in whole in scripted or in coded form?

Mr. ELLSBERG. Yes.

Senator THURMOND. If so, would it be possible for the disclosure of the action which was transmitted to compromise a cipher system which was in code?

Mr. ELLSBERG. No.



Senator THURMOND. In other words, could our national security have been compromised?

Mr. ELLSBERG. Not in that respect or any other known to me.

Senator THURMOND. Why did you transfer those papers to the press, rather than the Senate?

You said you have great confidence in the Congress.

Mr. ELLSBERG. I transferred them to the Senate about a year and a half before I did to the press. At the time, I gave them to the press, it was with the advice—I should say the opinion the Senate would be unlikely to deal with the information properly as I mentioned earlier.

Senator Fulbright's attempts to get the studies were all rebuffed. As his staff explained to me, if he had put them out unilaterally, there would have been the risk that the administration, that the Senate would no longer get any information and you would get less than you have, which as Senator Symington pointed out is not enough.

So that was a genuine risk.

Was the importance of getting this historical data out worth the risk, the cost, the procedures to the Senate?

I think everyone I discussed this with said the Senate should have it, but there was this practical cost; was it worth it?

Weren't these after all only history? I had to make my own judgment because I was the only person who had read them.

I had no aspersions on Senator Fulbright—he had other things to do than read the Pentagon Papers—but I did make my own judgment.

Senator THURMOND. Would you mind telling us whom you transmitted them to here at the Senate?

Mr. ELLSBERG. Senator Fulbright.

Senator THURMOND. That was a year or a year and a half before you exposed them?

Mr. ELLSBERG. This was the beginning in late 1969. This—by the way, the FBI knew, I understand now—began in late 1969. It took a while to copy them all, and give them, so it went into 1970.

Senator THURMOND. Based on your experience would you advise any person in the Government if they feel morally justified to violate security regulations, as you did?

Mr. ELLSBERG. Sir, I would advise anyone who believes that he has in his possession evidence documentary or otherwise of criminal misconduct of his superiors in the executive branch, it would seem to me to be his obligation to pass that on to the appropriate authorities and that does not include only those very same superiors who are implicated by that information.

Just to use names that are in the news now, if it is the case that Mr. Dean had such documents in his case in the White House, I believe he is tardy at passing that over to the courts and I am glad he has now done so, likewise Mr. Ehrlichman and others.

Senator THURMOND. What kind of law would you favor Congress enacting to allow individuals to make moral judgments and act in opposition to the law and the regulations?

Mr. ELLSBERG. I repeat, of course, in actual fact, there was no opposition to law. There was opposition to regulations which the more one looks at them violate the highest law of the land: the U.S. Constitution providing for separate, equal powers, providing for checks and balances and the Bill of Rights of the Constitution.

I think you should obey that law higher than any self-serving administration. I think he has obligations. He cannot meet those obligations without risk to himself ever. There will never be a bureaucracy in which one can tell outsiders to that bureaucracy, without risk, information that might embarrass your boss or embarrass him with his boss, information that would make him feel a liar or criminal or a foolish predictor or in any way hurt his budget.

You cannot do that safely and there is no way for Congress to make that safe in history.

But you can insure that the criminal prosecution process of the United States is not abused by that boss to add the threat of prison to the threat of loss of job and of being cast out into the outer darkness of readers of the New York Times.

Senator THURMOND. Then you feel that an individual who feels morally compelled has a right to substitute his judgment for the regulations and Executive orders that have been made pursuant to law and so construed by the court, to be made in pursuance of law?

Mr. ELLSBERG. As an American citizen, sir, he has rather complex obligations. His obligation is to take certain risks even if they are risks and frankly, as you all well know, even if you are Senators, one cannot cross the President of the United States without risk to your career.

The obligation is there, and it comes down to this, sir: In Russia your questions might have one answer. That means the country my grandparents left, to come to a country that did not have conscription—in Russia it would have been one answer; in China one answer; and the answer would be, the law for you whoever you are, is your boss' wish, going up to the Big Boss.

American citizens have a more complicated problem. They can make decisions only at their peril. They have loyalty to the written Constitution, to several branches of Government, to the whole democratic process.

I say that the American citizen, to answer your question, must consider that whole range of questions in deciding what he ought to do.

Senator THURMOND. What kind of system do you favor to prevent the alleged wrongs which you reveal?

Mr. ELLSBERG. Which ones are you referring to, Senator Thurmond?

Senator THURMOND. Well, the wrongs that you have revealed by your exposure of these papers in violation of the law?

Mr. ELLSBERG. Senator Thurmond, you are entitled to word your questions any way you want, but I don't want to be interpreted as agreeing with your formulation.

It is important to realize, in my opinion, that no law was broken—

Senator THURMOND. In spite of their construction by the New York court?

Mr. ELLSBERG. Sir, the construction of the U.S. court was not invoked and was not an issue in my case.

Senator THURMOND. Just go ahead and answer, if you will.

Mr. ELLSBERG. I feel it essential—although I am not a lawyer, merely a citizen—to say there is no law; because if we say, "for purposes of argument," that there is a law that makes it illegal per se, whatever the intent, for you to give information to your colleagues, for example, that might be top secret, to assert there is such a law, is to bring it into existence for practical purposes.



People will begin acting as if there were one, as they have been for too long.

The wrongs that I dealt with in the Pentagon Papers seemed to me on the one hand to deal with Indochina, with a total disregard for the people in Indochina, for the process of self-determination, for the impact on human beings of our policies, our obligations, total disregard of our obligations to our national law and domestic law.

I felt what was revealed was a process, not by one party, of contempt for law, contempt for democracy, contempt for human beings.

As I tried to describe, I think that helped—I had possession of secrets that are not available even to U.S. Senators as part of the magic potion that turns human beings like you and me into arrogant, contemptuous enemies of democracy.

Senator THURMOND. Would you give the names of each individual whom you gave a portion of the Pentagon Papers, any individual you caused to receive any portion either directly or indirectly.

Mr. ELLSBERG. No, sir. I would not collaborate. I would not collaborate with this Justice Department. For me to give you those names, and frankly every one of them is an American citizen who would feel pride having any part in this recognized—I am talking about the process of getting these to the newspapers—would be to give them to Mr. Mitchell's successors and subject them directly to the kind of, let us say, harassment and test that I have had for 2 years.

So, sir, another choice that I must make is to risk going to prison by suffering your contempt rather than to give you those names because I am sorry, I could not give them to you without giving them to the Justice Department.

Senator THURMOND. You refuse to answer the question?

Mr. ELLSBERG. Yes, sir.

Senator THURMOND. You plead the fifth amendment?

Mr. ELLSBERG. No, sir, no crime is involved. I am not worried about incriminating myself at all.

Senator THURMOND. Now, Dr. Ellsberg, are you here today to speak against the war; is that really the reason you wanted the forum today?

Mr. ELLSBERG. Sir, I am here at the invitation of the chairman.

Senator THURMOND. Are you using this forum to speak against the war?

Mr. ELLSBERG. The war has been on my mind and tends to get into all of my conversations in the last several years.

Senator THURMOND. Was your purpose here today to involve the President in the Watergate matter?

I believe you said that the President was involved in it; that he knew about it.

In another case you said that he was involved in illegal wiretaps. I believe, and it sounds a little inconsistent with your previous statement.

I don't know which was made first now, but during this testimony. But you did not feel that any man, although charged with a crime, should be called guilty or should be condemned until he has been found guilty?

Mr. ELLSBERG. Sir, if I have given the wrong impression, there. I thank you for the opportunity to correct it.

I do not think I have stated, as a matter of fact, that the President has been found even involved.

As has been often pointed out, at this point we are dealing with hearsay; we are dealing with revelations by insiders, by FBI people, by people who are telling reporters things that have not been said in any documented way.

There is no question whatever that unlike some others about whom there is considerable sworn testimony, there is very little linking the President and nothing in a documentary way directly.

That is why I stressed the point that I think he should be presumed innocent until proven guilty. But that does not mean that an American citizen is obliged to think that he had no involvement because, sir, what I understand of what it means to live in this country is that no one obliges me to think anything.

Senator THURMOND. He has stated that he had no involvement in it. Until he has been proven guilty by a court——

Mr. ELLSBERG. Sir, I have no power to subpoena, to indict or prosecute or put him in prison. He is quite safe from me in that respect.

If he is in any way made aware that I personally do not believe the statement that he made to us on television the other night, I doubt if that will affect his current troubles very much.

Senator THURMOND. You also stated here today that Mr. Buzhardt lied on the witness stand in California and he was under oath, and that means perjury.

You have already found him guilty before he has had a trial.

Mr. ELLSBERG. No, sir. Sitting in a courtroom for 5 months I am entitled to give you conclusions from hearing conflicting testimony.

Senator THURMOND. This is an exception to your statement that you think a man should not be said to be guilty until he has been found guilty by a court.

Mr. ELLSBERG. Senator Thurmond, just as the President can't pass a criminal law. I can't indict, prosecute, or convict.

So Mr. Buzhardt is thoroughly safe.

Senator THURMOND. It isn't a matter——

Mr. ELLSBERG. He is safe from my belief. He cannot go to prison on the basis of my belief.

Now, if I was sitting in a jury, I can report to you that having heard his testimony versus that of Colonel Miller and some others, I have chosen to believe Colonel Miller rather than Mr. Buzhardt. That does, regrettably, imply that Mr. Buzhardt lied under oath, but then that has happened before.

I have to admit that possibility.

Senator THURMOND. In other words, you are not adhering to your rule that you think a man should be proven to be guilty before he is held to be guilty?

Mr. ELLSBERG. I haven't used the word "guilty." If you in your daily life——

Senator THURMOND. Well, if you say he lied under oath and the court hadn't yet tried him for perjury——

Mr. ELLSBERG. Senator Thurmond, I am not playing games with you. I have no intention of doing it.

Senator THURMOND. It sounds like you are.

Mr. ELLSBERG. I am sorry.

I believe there is adequate evidence in the face of sworn testimony for a prosecutor to present to a grand jury for their judgment as to whether there constitutes sufficient grounds for criminal prosecution on the basis of perjury and the obstruction of justice.



I believe that because, having listened to the evidence so far without being on a grand jury, I think the evidence is convincing. There has not been an investigation, but sufficient, I believe to be given to a grand jury.

I believe it should be given to a grand jury. I am perfectly content to let the determination of guilt or innocence follow the process of indictment, prosecution, cross-examination of witnesses and everything else.

That applies not only to Mr. Buzhardt, but Mr. Mitchell and everyone else who has been indicted.

Senator THURMOND. Are you willing to withhold judgment until a court has found him guilty?

Mr. ELLSBERG. No, sir; I am not willing to act like a fool.

Senator THURMOND. How is that?

Mr. ELLSBERG. I am not willing to act like a fool. For example, if I were voting tomorrow, tomorrow I would be charged as a citizen to vote on my best guess as to uncertainties. I would have to tell you now my guesses would be different.

When I chose to vote the vote might not be different but the base would be different than it was a year ago, and I hope that is true for 100 million other voters.

You are not compelled to be a moron; you are not compelled in that capacity to ignore everything you are reading or to refrain from making any judgment on the appearance of a man who speaks to you on television.

On the contrary, you are challenged as a voter in a free society to use everything you know and everything you guess.

The jurors' position during a trial is a very unnatural one. It is for the special purpose of a trial. It requires the juror to be told several times a day, "withhold judgment until you have heard all the evidence."

But that is related to a very specific action.

If voters acted on that same principle, we would be duped and abused even more than we are.

Senator THURMOND. Dr. Ellsberg, I am interested in seeing the truth come out regardless of who it helps or who it hurts, to seek the truth and that is the only goal I have in mind.

Mr. ELLSBERG. I believe it.

Senator THURMOND. As a member of the Armed Services Committee, we heard testimony the last 2 days, which, if true, appears to involve people high up in high places and the truth should not be withheld.

It should be brought out and that is the position I will take, but I do not believe in accusing people, condemning people, or finding them guilty until the proper forum, and that is our courts, have acted on that matter.

Mr. ELLSBERG. Sir, I accept that reproof as you see it.

I would like to point out to you, you are in a different position from me.

As a member of the Senate you are a potential member of a jury, quite literally a jury that may sit in legal judgment on a President. You know that you are in that position because you have been reading the newspaper and listening to testimony.

Therefore, like a potential juror, in my opinion, you have a special restraint to keep your mind free.

I am happy to leave that responsibility up to you. You have not heard me talk about impeachment because it is not something I do as a member of the public. It is up to you.

I, like you, am interested in the truth finding process.

If I sounded at all sharp, I apologize, because I am here in deep respect to all of you and the offices you hold, and when I say what I believe, for what that is worth, I am interested in seeking the truth. I will tell you what I think is the truth whether under oath or not.

I started today by saying there is a celebration in my being here, despite, whatever you think of the charges against me, or whatever you think of the White House or whatever, I believe there is an aspect of celebration for everyone because the independent judiciary has shown not only its continued vitality by the process that ended my trial, I think it reached justice in this case. Certainly it showed independence of the executive which sought, face to face, to subvert, to obstruct justice.

The FBI is acting today, and again certainly Congress is acting, and the press is acting as they have not always acted, in my opinion, to protect us from abuses by the executive branch, and that is something to celebrate.

The Government is functioning healthily today as it has not always done in the past. I as an American citizen am glad of that.

I thank you for your attempt to get the truth to us and your invitation.

Senator THURMOND. Aren't you now accusing the FBI before they have been convicted?

Mr. ELLSBERG. I am not here to accuse at all.

Senator THURMOND. That is the effect of what you just said.

Mr. ELLSBERG. I am here stating under oath——

Senator THURMOND. Why don't you prove these things and go into court. Go before a grand jury if you have evidence.

What you are doing here, the effect of it is to try to destroy the confidence of the American people in their Government, and that is one thing I resent.

There may be dishonesty and corrupt people in this Government and they should be ferreted out and gotten rid of, but I don't think the entire Government is corrupt.

The Congress could be involved, the judiciary could be involved. The executive branch could be involved. Ferret out the individuals and not bring a blanket charge against the whole Government agency like the FBI, or the CIA, or any other Government agency.

Mr. ELLSBERG. I don't know that I have made myself clear, but I will repeat. You have heard me say that our ability to get this information, your ability to deal with the legal issues if you ever get them, depends on the conscience of many, many FBI agents, Defense Department employees. Colonel Miller was a man who worked at that time and got the information to us at the risk of his retirement, Sam Adams at the risk of his job: each of their consciences told them to follow the truth.

I am certainly not criticizing the Government. I strongly disagree with the practice of the Justice Department in framing all of its indictments "The United States of America versus John Doe." whether Daniel Ellsberg or John Mitchell. Mitchell might appreciate that now a little more.



I hope he understands it is not United States versus John Mitchell: it is the Justice Department versus John Mitchell.

We are being saved by the checks and balances as the Constitution intended to happen.

I am glad of it.

On the other hand, it would be foolish to suppose that only individuals are involved. There is a system gone awry.

Abuses incurred by individuals not just this year, but for a generation. They have occurred because all of us, Congress, the President, the churches, the unions, the public have really deferred to the executive branch in too many areas and decided that the Constitution is obsolete and we had to turn over our responsibilities to them.

As I say, a country where that happens isn't America as the Constitution defines it.

Senator THURMOND. Of all people who ought to have faith in this Government is a man like you who has been charged——

Mr. ELLSBERG. I have positive hope and gratitude.

Senator THURMOND. The case was thrown out although your guilt or innocence has never been established.

Mr. ELLSBERG. You have heard me say that.

Senator MUSKIE. May I say that your innocence is given to you until it is proven otherwise. I disagree with Senator Thurmond on that point. His innocence is established under our system, Senator, until it is proven otherwise.

Now, Dr. Ellsberg.

Senator THURMOND. The court did not pass on his innocence or guilt. It threw the case out, as you well know, because of the prosecution tactics.

Senator MUSKIE. Senator, the court doesn't have to prove his innocence. The Constitution gives him his innocence until the court finds him guilty.

Senator THURMOND. They discontinued because of the tactics. You well know it. It doesn't prove him guilty or innocent either. That is the point I am making.

Senator MUSKIE. Senator, you are guilty of the very posture that you have attributed to this witness.

Senator THURMOND. You are guilty yourself. You have involved politics in this hearing. You brought him here today to speak against the President of the United States.

Senator KENNEDY. Regular order, Mr. Chairman.

Senator THURMOND. I am surprised at you, a Presidential candidate. You are not fit to be a Presidential candidate.

Senator MUSKIE. Dr. Ellsberg, I apologize for subjecting you to this display of senatorial temper, but let me make clear for the record you did not solicit this appearance.

I invited you to these committees, the three of them, and may I remind my colleagues we are undertaking to examine the policies of secrecy which have been involved in many of the traumatic experiences of our country and our people in recent years.

You offered two personal experiences relevant to this inquiry: one, your 12 years' experience as one entrusted with secrets under these policies; and, two, the case with which you are involved.

I think the discussion has been relevant to the inquiry of these subcommittees and the purpose which I expected your appearance to serve.

Occasionally, we are diverted in these hearings from the central purpose of a hearing, and that is as often the responsibility of the Senators as the witness, but I think your appearance has been constructive.

I think you have every reason to be proud of your demeanor and your attitude at this hearing this morning, and I express my personal appreciation for it.

I yield to Senator Kennedy.

Senator KENNEDY. I just want to also commend the chairman for these hearings.

As Senator Muskie has pointed out, they are a continuation of the hearings of three different subcommittees that have different interests and jurisdictions on the whole question, not only on this particular issue of classification, but my own subcommittee, the Administrative Practice Subcommittee has the jurisdiction over the Freedom of Information Act which relates to the access to Government information by the public.

So this testimony this morning that you gave is, I think extraordinarily useful and helpful and valuable. I want to say how constructive your comments have been and to thank Senator Muskie for chairing these hearings this morning and for the leadership that he has provided in this area of classification and the restrictions which all of us have felt here in Congress when information is withheld within the executive branch.

Government secrecy affects not only you, Mr. Ellsberg, but Mr. Krause a parent of one of the children who was shot out at Kent State. We have been trying unsuccessfully to get the information that was gathered by the Justice Department since that tragedy. Congress has also been unable to obtain the SEC files on ITT's antitrust settlement. They refused to turn that material over during the course of the Kleindienst hearings.

We have requested the information on the rules of engagement affecting the bombing policy in Cambodia and the impact that has had on refugees over there, but the Defense Department has refused to respond to inquiries of the Subcommittee on Refugees. There is a wide variety of different instances of withholding of information that all of us are familiar with here in the Congress.

I think your instance is obviously the most dramatic, but it is an issue which affects so many of us in attempting to fulfill our own responsibilities.

I think Senator Muskie is performing a very constructive and important service, and I again want to thank the Chair for commencing these hearings.

Mr. ELLSBERG. Thank you.

Senator MUSKIE. Thank you, Senator Kennedy.

If there are no further questions, the hearing is adjourned.

[Whereupon, at 1:05 p.m., the hearing was adjourned.]



## STATEMENTS AND LEGISLATION INTRODUCED ON EXECUTIVE PRIVILEGE, SECRECY IN GOVERNMENT, FREEDOM OF INFORMATION

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[From the Congressional Record, Feb. 15, 1973]

### REMARKS OF SENATOR FULBRIGHT ON INTRODUCING S. 858

MR. FULBRIGHT. Mr. President, 2 years ago, extensive and illuminating hearings were held on a bill which I proposed to restrict and regulate the practice known as "executive privilege." Since that time the practice, remaining unregulated, has grown into a habit. The administration submits—or more commonly withholds—information desired by the Congress according to its own regulated conception of the convenience and advantage of the executive branch of our Government. In a memorandum on the subject addressed to the head of executive departments and agencies on April 17, 1969, President Nixon purported to limit the use of "executive privilege," but at the same time he claimed a right for the executive to withhold information from Congress when disclosure "would be incompatible with the public interest"—the executive being the sole judge of what was or was not in the "public interest."

When we speak of executive privilege, it should be understood that we are not referring simply to those relatively infrequent instances when the President formally invokes that dubious doctrine. Far more frequently executive branch officials employ tactics of delay and evasion which permit the executive to exercise executive privilege without actually invoking it and without honoring the commitment of three Presidents that only the President would invoke executive privilege. As matters now stand, that commitment has been reduced to a meaningless technicality; only the President may invoke executive privilege but just about any of his subordinates may exercise it—they withhold information as they see fit but they do not employ the forbidden words.

At the same time that the executive has made increasing use of executive privilege in this broader, more meaningful sense of withholding information by a variety of devices, more informal than formal, Congress has become increasingly alert to the implications of executive secrecy. Without information, it is now increasingly recognized, Congress is scarcely able to investigate or oversee the execution of its laws, and if it cannot engage in these functions, it is scarcely qualified to make the laws at all.

With a view to breaching the barricades of executive secrecy, I resubmit today, in altered form, the "executive privilege" bill (S. 1125), which I first introduced on March 5, 1971. Taking account of the increasing abuse of executive privilege—in its broader sense—and of the growing disposition of Congress to deal with it, I have strengthened my bill by adding to it the recent proposal of the Senator from Mississippi (Mr. Stennis) and the Senator from Wisconsin (Mr. Nelson). My bill, as originally formulated, would require employees of the executive branch to appear in person before Congress or appropriate congressional committees when they are duly summoned, even if, upon their arrival, they do nothing more than invoke executive privilege. One purpose of this bill is to eliminate the unwarranted extension of the claim of executive privilege from information to persons. It would require an official such as the President's Assistant on National Security Affairs to appear before an appropriate congressional committee if only for the purpose of stating, in effect:

"I have been instructed in writing by the President to invoke executive privilege and here is why. . . ."

Going beyond the requirement that executive officials appear when summoned, the Stennis-Nelson proposal would charge the congressional committee concerned with the responsibility of deciding whether or not a witness's plea of executive privilege were "well taken." If not well taken, the witness would be required to provide the information requested. Further, when any committee

upholds or denies an invocation of executive privilege, it would then be expected to submit an explanatory report and resolution to the entire Senate, which would then have the responsibility of taking appropriate action. This extremely desirable provision, already approved by the Democratic Policy Committee and caucus, would place the final responsibility for judging the validity of a claim of executive privilege in the Congress, where it belongs.

My bill goes on to lay down specific guidelines for the invocation of executive privilege by the Executive. First, and perhaps most important, the principle would be established that information could be withheld from Congress only on the basis of a formal invocation of executive privilege, in effect, eliminating the all-too-common executive practice of withholding information on vague and insubstantial grounds, such as the contention that a document is purely a "planning" document, or that it would be "inappropriate" or "contrary to the national interest" to disseminate it more widely.

In addition, the bill would write into law the personal commitment made by each of the last three Presidents that executive privilege will be invoked only on the specific order of the President, only, in the language of my bill—

"If the President signs a statement invoking such privilege with respect to that information requested."

The bill further spells out procedures through which, within a limited time period, agency heads judging there to be compelling circumstances for the withholding of requested information from Congress, a congressional committee, or the General Accounting Office, would be required to gain the assent first of the Attorney General, and then of the President, before executive privilege could be invoked.

Should the Attorney General fail to agree with the agency head on the need of secrecy, or should the President decline to invoke executive privilege, the requested information would be made available immediately.

Finally, the bill provides that, if within 30 days the executive has neither provided the requested information nor invoked executive privilege, funds will be cut off from the agency concerned until either the information is provided or executive privilege formally invoked.

Executive privilege is a custom not a law and, even as a custom, it has been understood until recently to apply to information rather than persons. Neither law nor custom authorizes individual advisers to the President to refuse to appear before a congressional committee. The refusal to give due account of the President's policies and proposals is an extension of the extraordinary contention, spelled out in a Justice Department memorandum in 1958, that—

"Congress cannot, under the Constitution, compel heads of departments by law to give up papers and information, regardless of the public interest involved; and the President is the judge of that interest."

The memorandum goes on to assert that the withholding of information is a political rather than a legal matter, and that neither Congress nor the courts may compel the President to provide information when in his own judgment, it would be "inexpedient" to do so.<sup>1</sup>

This, of course, is a repudiation of the very concept of a government of checks and balances. If the President has sole discretion to keep information from Congress and the country, he is in practice at liberty to do anything he wishes, at home or abroad, as long as he manages to keep it secret.

History, logic, and law show that the President is indeed obligated to provide pertinent information to Congress; nor can he claim to be the final judge of what in fact is pertinent. In his authoritative book, "The President, Office and Powers," Prof. Edward Corwin comments:

"Should a congressional investigating committee issue a subpoena *duces tecum* to a Cabinet officer ordering him to appear with certain adequately specified documents and should he fail to do so, I see no reason why he might not be proceeded against for contempt of the House which sponsored the inquiry."<sup>2</sup>

If the matter of accountability were to come to a final test—and it is preferable that it does not—there is no question of the legal authority of Congress, or of a congressional committee, to subpoena a Government official, just as it can subpoena a private individual to appear and give testimony, and to hold that individual in contempt should he fail to comply. Under section 134a the Legislative

<sup>1</sup> *The Power of the President To Withhold Information From the Congress—Memorandum of the Attorney General*, compiled by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 85th Cong., 2d sess., pages 3-4.

<sup>2</sup> Edward S. Corwin, *The President, Office and Power* (New York University Press: 1957), pp. 281-282.



Reorganization Act of 1946, every standing committee and subcommittee of the Senate is authorized—

“to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures . . . as it deems advisable.”

The power and duty of legislative oversight are rooted deeply in our constitutional history. In the words of a study of the congressional power of investigation prepared for the Senate Judiciary Committee in February, 1954:

“A legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivaling most legislative institutions in the antiquity of its origin. Its roots lie deep in the British Parliament, and only in the light of a knowledge of these origins and subsequent developments does it become possible to comprehend its limits.”<sup>3</sup>

The same general proposition was endorsed by the Supreme Court in *McGrain* against *Daugherty* in 1927, in which the Court stated that: The power of inquiry—with power to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified.

Legislative inquiry and oversight are of course impossible without pertinent information. Insofar as the Executive is at liberty to withhold information, he is also at liberty to nullify the ability of Congress to exercise legislative oversight. To state the matter in its simplest terms: If Congress does not have the information it considers necessary, it cannot effectively investigate the executive; and if Congress does not investigate the executive, there is no one to do it but the executive itself. Quite understandably, any administration must find it comfortable and convenient to serve as its own judge and jury, but such an arrangement is anathema to our constitutional system of separated powers checked and balanced against each other.

Secrecy and subterfuge are themselves more dangerous to democracy than the practices they conceal. Totalitarian devices such as military surveillance of civilians, the infiltration and sabotage of a political opposition, and efforts to intimidate the news media cannot long survive in the full light of publicity. An ill-conceived war, once recognized as such by the people and their representatives, must eventually be brought to an end. But without publicity and debate there is no redress. Secrecy not only perpetuates mistaken policies; it is the indispensable condition for their perpetuation. Twenty-three years ago, in different context, Congressman Richard Nixon of California endorsed that proposition:

“The point has been made that the President of the United States has issued an order that none of this information can be released and that, therefore, the Congress has no right to question the judgment of the President. I say that that proposition cannot stand, from a constitutional standpoint, or on the basis of the merits. . . .”<sup>4</sup>

In the words of the great early American legislator Edward Livingston of New York:

“No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual impositions and abuses, which were imperceptible, only because the means of publicity had not been secured.”<sup>5</sup>

The bill concerning executive privilege which I introduce today is designed to help secure the “means of publicity” of which Livingston spoke and, in so doing, to help restore the Congress to its proper role as the guardian of democratic liberties. The purpose of this bill is not to eliminate but to restrict the practice of executive privilege, by reducing it to bounds in which it will cease to interfere with the people’s right to know and the Congress’ duty to investigate and oversee the execution of the laws.

Mr. President, I ask unanimous consent that the bill be referred to the Committee on Government Operations.

The Presiding Officer. Without objection, it is so ordered.

<sup>3</sup> *Congressional Power of Investigation*, Study Prepared at the Request of Senator William Langer, Chairman of the Committee on the Judiciary, by the Legislative Reference Service of the Library of Congress, U.S. Senate, 83d Congress, 2d session (Washington: U.S. Government Printing Office, 1954), p. 23.

<sup>4</sup> Congressional Record, April 22, 1948, p. 4782.

<sup>5</sup> Quoted in Raoul Berger, “Executive Privilege v. Congressional Inquiry,” *UCLA Law Review*, May 1965, p. 1332.

93D CONGRESS  
1ST SESSION

# S. 858

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 15, 1973

Mr. FULBRIGHT introduced the following bill; which was read twice and referred to the Committee on Government Operations

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## A BILL

To amend title 5, United States Code, with regard to the availability to the Congress and the General Accounting Office of information of the executive branch of the Government.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That (a) chapter 3 of title 5, United States Code, is amended  
4       by adding at the end thereof the following new sections:

5       **“§ 306. Executive privilege**

6       “(a) An employee of the executive branch summoned  
7       or requested to testify or produce documents before Congress,  
8       any joint committee of Congress, any committee of either  
9       House of Congress, or any subcommittee of any such com-



1. mittee, shall not refuse to appear on the grounds that he  
2 intends to assert executive privilege.

3       “(b) In no case shall an employee of the executive  
4 branch appearing before the Congress, any joint committee  
5 of the Congress, any committee of either House of the Con-  
6 gress, or any subcommittee of any such committee, in re-  
7 sponse to a summons or request, assert executive privilege  
8 unless the employee presents, at the time executive privilege  
9 is asserted in response to any testimony or document sought,  
10 a statement signed personally by the President requiring  
11 that the employee assert executive privilege as to the testi-  
12 mony or document sought.

13       “(c) When such an employee presents such statement,  
14 it shall then be a question of fact for the committee to decide  
15 (including, in the case of the assertion of such privilege  
16 before a subcommittee, for the committee of such subcom-  
17 mittee to decide) whether the assertion of executive privilege  
18 is well taken. If not well taken, the employee shall be ordered  
19 to provide the testimony or document sought. When any  
20 such committee upholds or denies the assertion of executive  
21 privilege, it shall within ten days file with its House of Con-  
22 gress (or, in the case of a joint committee, with each House  
23 of Congress) a resolution, together with a report and record  
24 of its proceedings bearing on such assertion of executive privi-

1 lege, and shall take such action as such House or Houses  
2 deems proper on disposition of any such resolution.

3 **“§ 307. Availability of information to Congress and the**

4 **General Accounting Office**

5 “(a) The Congress declares that information of, or under  
6 the custody or control of, any agency of the Government is  
7 to be made available to the Congress so that the Congress  
8 may exercise, in an informed manner, the authority con-  
9 ferred upon it by article I of the Constitution to make laws  
10 necessary and proper to carry into execution the powers  
11 vested in the Congress and all other powers vested in that  
12 Government or any department or officer thereof.

13 “(b) For the purpose of this section—

14 “(1) ‘agency’ means—

15 “(A) an executive agency;

16 “(B) a military department; and

17 “(C) the government of the District of Colum-  
18 bia;

19 “(2) ‘employee’ means—

20 “(A) an employee in or under an agency; and

21 “(B) a member of the uniformed services;

22 “(3) ‘Government’ means the Government of the  
23 United States and the government of the District of  
24 Columbia; and



1           “(4) ‘information’ includes any information, paper,  
2       record, report, or document.

3           “(c) Any information of, or under the custody or con-  
4       trol of, any agency or employee of that agency shall be  
5       made available to any joint committee of the Congress, any  
6       committee of either House of the Congress, any subcom-  
7       mittee of any such committee, or the General Accounting  
8       Office, upon request of any such committee, subcommittee,  
9       or office for information relating to matters within the juris-  
10      diction of the committee, subcommittee, or office making the  
11      request, unless executive privilege is invoked with respect  
12      to that information and is invoked in accordance with this  
13      section.

14          “(d) Executive privilege shall be invoked with respect  
15      to any information so requested only if the President signs  
16      a statement invoking such privilege with respect to that  
17      information requested.

18          “(e) (1) Any information requested by any such com-  
19      mittee, subcommittee, or office shall be furnished immedi-  
20      ately unless the head of the agency which receives the  
21      request determines, as soon as practicable after receiving  
22      the request, that the information requested is information  
23      with respect to which the head of the agency believes there  
24      are compelling circumstances for invoking executive privi-  
25      lege. If the head of the agency so determines, he shall

1 immediately inform the committee, subcommittee, or office  
2 requesting the information of his belief and shall consult  
3 with the Attorney General or his designee to obtain advice  
4 on the question whether to seek invocation of the privilege  
5 by the President.

6       “(2) If, after a prompt and thorough consideration, the  
7 head of the agency and the Attorney General or his designee  
8 agree that compelling circumstances do not exist for invoking  
9 executive privilege, the information requested shall be  
10 made available immediately to the committee, subcommittee,  
11 tee, or office requesting that information. If the head of the  
12 agency and the Attorney General or his designee believe  
13 that compelling circumstances exist for invoking executive  
14 privilege, they shall recommend to the President in writing  
15 that the privilege be invoked. If fifteen days after an agency  
16 has received a request for information, no such recommendation  
17 has been transmitted to the President, such information  
18 shall be made available immediately to the committee,  
19 subcommittee, or office requesting the information.

20       “(3) If the President invokes executive privilege with  
21 respect to any information requested, such committee,  
22 subcommittee, or office requesting the information shall be  
23 furnished promptly with a statement by the President in  
24 writing giving his reasons for invoking executive privilege



1 with respect to the information so requested. If the Presi-  
2 dent does not invoke executive privilege with respect to  
3 information so requested within fifteen days after a recom-  
4 mendation seeking invocation of the privilege has been  
5 transmitted to the President, such information shall be made  
6 available immediately to the committee, subcommittee, or  
7 office requesting that information.

8 “(f) If the General Accounting Office determines that  
9 any information requested of an agency by any such com-  
10 mittee, subcommittee, or office has not been made available  
11 within a period of thirty days after the request has been  
12 received by that agency, and if during such period the  
13 President has not signed a statement invoking executive  
14 privilege with respect to that information, no funds made  
15 available to that agency shall be obligated or expended  
16 commencing on the fortieth day after such request is received  
17 by such agency or employee of that agency, unless and until  
18 such information is made available or the President invokes  
19 executive privilege with respect to such information.

20 “(g) The provisions of this section shall not apply with  
21 respect to testimony or documents sought from an employee  
22 of the executive branch summoned or requested to testify or  
23 produce documents before Congress, any joint committee of

**1** Congress, any committee of either House of Congress, or any  
**2** subcommittee of any such committee.”

**8** (b) The analysis of such chapter is amended by adding  
**4** at the end thereof the following new items:

“306. Executive privilege.

“307. Availability of information to Congress and the General Account-  
ing Office.”.



## AGENCY COMMENTS

(S. 858)

DEPARTMENT OF JUSTICE,  
Washington, D.C., July 10, 1973.

Hon. SAM J. ERVIN, JR.  
*Chairman, Committee on Government Operations,*  
*Washington, D.C.*

DEAR SENATOR ERVIN: This is in response to your request for the Department of Justice comments on S. 858, to amend title 5, United States Code, with regard to the availability to the Congress and the General Accounting Office of executive branch information.

The bill would add to title 5, United States Code, two new sections, namely, secs. 306 and 307. Section 306 would provide (a) that an employee of the executive branch summoned to testify or produce documents before Congress or a committee or subcommittee, cannot refuse to appear on the ground that he intends to assert executive privilege; (b) that executive privilege may be claimed only on the basis of a statement signed personally by the President requiring the employee to claim the privilege; and (c) that after the claim has been asserted, the committee is to decide as a "question of fact" whether the privilege is well taken. If the committee denies the claim, the witnesses shall be ordered to answer or produce the document. In any event the committee shall file with its House a resolution bearing on the claim of privilege and take such action as the House directs in disposing of the resolution.

Section 307—if we correctly interpret the import of subsection (g)—deals with *requests for information* addressed to an agency or employee of an agency as contrasted with *requests to testify* or to produce documents. The section provides in substance that information, requested by Congress, a committee thereof, or by the General Accounting Office, must be furnished, unless executive privilege is invoked in the form of a certificate signed by the President giving his reasons for invoking the privilege. If the General Accounting Office determines that any such information has not been furnished within a period of thirty days, and the President has not invoked executive privilege in the manner provided for, no funds made available to that agency shall be obligated or expended by it commencing on the 40th day after the receipt of the request, unless and until the information is made available or the President invokes executive privilege. Section 307 also prescribes in detail the procedure in which inquiries that may require the invocation of executive privilege are to be processed within the executive branch and the matter submitted to the President for determination.

The Department of Justice opposes this legislation on the ground that it would violate the fundamental principle of the separation of powers. We take this position with all due respect to the proper interest of Congress in obtaining information on the workings of the Government and the execution of the laws. Set against this interest is the equally proper interest of the Executive in protecting from disclosure certain kinds of information. This power in the Executive, commonly termed "executive privilege," is very rarely invoked. A spirit of cooperation is the rule. Nevertheless the discretion to invoke or not to invoke the privilege is necessarily a discretion of the Executive, else there would in truth be no executive privilege. Correspondingly, the discretion to invoke or not to invoke the privileges and immunities under the Speech and Debate Clause is a discretion committed to the members of the legislative branch, and beyond the reach or control of the executive branch. Both branches, of course, in appropriate circumstances, may be subject to the interpretations of the judicial branch in regard to their respective constitutional prerogatives.

The effect of proposed section 306 of title 5, United States Code, would be that even if the President should invoke executive privilege with respect to the appearance of an executive branch witness before a committee, the witness still would have to appear and present to it the President's written claim of privilege. This Department has a preliminary objection to the terminology of section 306 which may appear to be a matter of form but which is in fact fundamental in nature. The bill is drafted as though the witness were the one asserting the privilege. Executive privilege, however, belongs to the President and not to the witness; the President, not the witness, asserts it.

As to the substance of section 306, we believe that it is inconsistent with the proper relationship between two co-equal branches of the Government to require an executive branch official to appear before a committee for the sole purpose of submitting the President's statement that he asserts executive privilege as to appearance of the witness or the testimony or document sought. Considering that the executive branch and Congress are co-equal branches of the Government and owe each other an appropriate degree of comity, a written communication from the President should suffice where his claim of privilege goes to the very appearance of the witness, to all of the envisaged testimony, or all of the requested documents. In a reverse situation, *i.e.*, should a court or an executive agency (which possesses subpoena power) subpoena a Senator to testify or to produce documents in the custody of the Senate, and should the Senate deny the Senator leave to appear or prohibit the production of the documents (Senate Rules V(1) and XXX), this body unquestionably would consider it an affront to its privileges if the court or agency insisted that the Senator personally present to it the Senate resolution denying him leave to appear and enjoining him from producing the documents.

In a case in which the Senate had limited the scope of the response of a Senator and of Senatorial employees to a judicial subpoena, Senator McClellan pointed out:

"The Senate recognizes it has certain privileges as a separate and distinct branch of the Government which it wishes to protect." 108 Cong. Rec. 3627.

In a similar situation the judicial branch has recognized that it would serve no useful purpose to require a high government official to respond to a subpoena for the sole purpose of claiming privilege. Thus, in a case in which the Chairman of the Federal Trade Commission had been subpoenaed to be interrogated about the motives and considerations which induced him to take certain discretionary actions, Judge Holtzoff of the District Court for the District of Columbia quashed the subpoena on the following grounds:

"The Chairman of the Federal Trade Commission would be entirely within his rights if he appeared at the taking of the deposition and declined to answer such questions. However, it is very burdensome to insist that the head of a government agency respond in person to subpoenas such as this, if it appears that the matters to be inquired into are not subject to interrogation, because it is contrary to the best interest of the public to require the heads of government departments to fritter their time away appearing at the taking of depositions merely for the purpose of declining to answer. The burden that would be placed upon heads of departments and heads of agencies would completely interfere with the transaction of public business." *Federal Trade Commission v. Bart Schwartz, International Textiles, Ltd.*, U.S.D.C. for the District of Columbia, Misc. No. 39-57, December 9, 1959.

The considerations referred to by Judge Holtzoff become even more significant when an officer of cabinet rank, or an immediate adviser to the President, is subpoenaed by a congressional committee not in order to testify but only to produce a document. No valid purpose can be served by requiring personal appearance merely to present the President's claim of privilege.

Subsection (c) of the proposed 5 U.S.C. 306 would provide that it shall be a "a question of fact for the committee to decide whether the assertion of privilege is well taken." This clause gives rise to serious problems. Basically, the import of the committee's determination whether the privilege has been properly asserted is not clear. If it were merely to represent the *view* of the committee, and is not designed to have any greater weight than the President's claim of privilege, we would have no serious objection. Under existing practice, committee chairmen have recognized the President's authority to claim privilege. See, *e.g.*, *Military Situation in the Far East*, Hearings before the Committee on Foreign Relations, U.S. Senate, 82d Cong., 1st Sess., pp. 763, 832-872; *Military Cold War Education and Speech Review Policies*, Hearings before the Special Preparedness Subcommittee of the Committee on Armed Services, U.S. Senate, 87th Cong., 2d Sess., p. 512.

The statements made by Senator Fulbright in introducing the bill, however, suggest that the clause is designed to assert for Congress the power of ultimate determination of the propriety of invoking executive privilege, and thus to substitute the judgment of the committee for that of the President. If this is the correct interpretation, this subsection would be a trespass on the constitutional power of the Executive.



It has been established since the St. Clair incident of 1792 that the President exercises an exclusive discretionary power when he decides to invoke executive privilege. The essentially discretionary nature of the privilege was reaffirmed by President Tyler in his message to the House of Representatives of January 31, 1843. 4 Richardson, *Messages and Papers of the Presidents* 220. *Marbury v. Madison*, 1 Cranch 137, 166 (1803), and *Decatur v. Paulding*, 14 Pet. 497, 514-517 (1840), have settled as a necessary incident of the doctrine of the separation of powers that one branch of the Government cannot reexamine the exercise of discretion by another co-equal branch. This is a jurisdictional principle.\*

This rule was reaffirmed relatively recently in *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958). Significantly, Senator Stennis' ruling recognizing President Kennedy's claim of privilege in the Military Cold War Education and Speech Review Policies Investigation, *supra*, was based essentially on the view that under the doctrine of the separation of powers neither branch may in this area impose its will on the other. In particular he ruled that Congress does not have the power to review determinations of the executive branch to invoke privilege because they are of a discretionary nature, and that conversely neither the President nor the courts could compel Congress to surrender its own records. *Military Cold War Education and Speech Review Policies, supra*, at pp. 510-512.

This does not mean that the executive branch is superior to Congress because it has the power to thwart a congressional request for information, any more than that the Speech and Debate clause makes Congress superior. The President's claim of privilege is based on his equally important responsibility to prevent that disclosure of information if such disclosure is contrary to the public interest, in particular the proper operation of the executive branch.

\* \* \* \* \*

With respect to proposed 5 U.S.C. 307, the Department of Justice has the following comments:

Proposed section 307(e) would set forth in detail the procedure which is to be followed in the event an agency head believes that a demand for information may be subject to a claim of executive privilege. The subsection generally follows President Nixon's memorandum of March 24, 1969, establishing a procedure to govern compliance with congressional demands for information. We believe that the scheduling manner in which potential claims of executive privilege are screened and processed before they are submitted to the President is basically a matter of internal executive procedure which should be decided by the President and not by the Congress. This view necessarily flows from the jurisdictional principle we have articulated in our foregoing discussion of proposed section 306. Moreover, it should be noted that subsection (e) does not cover the situation where the agency head and the Attorney General may disagree on the question whether executive privilege is to be invoked.

In contrast to the detailed procedural requirements of subsection (e) of section 307 concerning the manner of executive *response* to requests for information, subsection (c) does not establish any corresponding formal requirements concerning the manner of *making* requests for information by committees, subcommittees, or the General Accounting Office. Hence, it is not clear whether the subsection is intended to refer to informal requests by staff members of committees, subcommittees or of the General Accounting Office, or only to formal demands made by a committee or subcommittee, or the Comptroller General, after negotiations and discussions following the original requests have not led to a satisfactory result.

The definition of what constitutes a "request" within the meaning of the bill is crucial since it determines when the request has to be submitted to the President and when the cut-off period begins to run. Moreover, congressional requests for information are frequently rather broad and indefinite when originally submitted, and are narrowed down or rendered more precise only after a consider-

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\*Especially significant in this context is the following jurisdictional statement of Thomas Jefferson made in response to the subpoena *duces tecum* approved by Chief Justice Marshall in the *Burr* case:

"Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to who, I assure you of my readiness, under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require." *United States v. Burr*, 25 Fed. Cas. (No. 14,693) 55, 65. (Emphasis added).

able give and take between the committee and the agency. Only at that time can it be determined whether the agency can comply with the request in full or whether the matter has to be referred to the President pursuant to the March 24, 1969 memorandum. Respect for what Senator Mathias has characterized as the spirit of accommodation which is a necessary lubricant of our separation of powers system most certainly dictates that consequences as serious as a cut-off of funds should not occur casually. They should not result from anything less than unmistakable formal action, such as a formal vote of a full committee or a formal demand by the Comptroller General to be taken only after the agency response to an original demand has been considered to be unsatisfactory. This appears to be the actual practice under section 634(c) of the Foreign Assistance Act, from which subsection (f) has been derived.

Subsection (f) would provide in substance that if the Comptroller General determines that requested information has not been made available within thirty days and the President has not claimed executive privilege, funds made available to that agency shall not be obligated or expended commencing the fortieth day following the receipt of the request by the agency. The bill does not provide for the common contingency where a request for information is withdrawn in full or in part. Moreover, it would seem that the committee or the Comptroller General, as the case may be, is best qualified to determine whether there has been full or satisfactory compliance.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Cordially,

MIKE McKEVITT.

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[From the Congressional Record, Mar. 8, 1973]

#### REMARKS OF SENATOR ERVIN ON INTRODUCING S.J. RES. 72

Mr. ERVIN. Mr. President, today I introduce, for appropriate reference, a joint resolution proposing steps to be taken by the Congress when any head of a department or agency of the United States, or officer or employee of the United States refuses to provide information requested by the Congress or any of its committees or subcommittees, whether by refusing to appear and testify or by refusing to provide documents or other matter.

As we all are aware, the failure or outright refusal of Federal officers and employees to produce information requested by the Congress for its use in carrying out its constitutional obligation to legislate has resulted in a serious erosion in the separation of powers principle embodied in the Constitution.

For almost 6 years, the Senate Judiciary Subcommittee on Separation of Powers which I am honored to serve as chairman, has studied the problems raised by so-called executive privilege, and in July 1971, the subcommittee conducted 5 days of hearings on the subject. At that time the subcommittee considered S. 1125, a bill introduced by Senator Fulbright, designed to limit the assertion of executive privilege. During those hearings, the subcommittee fully explored the conflict between the alleged power of the President to withhold information when he feels its disclosure would impede him in the performance of his constitutional duties and the power of the legislative branch to obtain information needed to legislate wisely and effectively. The basic right of the taxpaying public to know what its Government is doing and the underlying facts upon which it bases its actions was also considered.

These basic principles have clashed repeatedly since President Washington's first term, when the Congress undertook to investigate the St. Clair expedition. Without objecting to the propriety of the investigation, President Washington's advisors concluded that, while the Congress might institute inquiries, and call for papers generally, and while the Executive ought to provide those that the public good would permit, the Executive nonetheless had the discretionary power to refuse to communicate any information the disclosure of which would injure the public. Despite this contention, however, all of the requested papers were turned over to the Congress. Thus the celebrated St. Clair incident by no means constitutes precedent for withholding of information from the Congress by the President or departments or agencies of Federal Government.



There is little disagreement that the power to institute inquiries and exact information is integral to the congressional power to legislate—*McGrain v. Daugherty*, 273 U.S. 165 (1927). However, several Presidents have urged that the Chief Executive has the power to withhold information from the Congress and from the public, based upon article II, section 3 of the Constitution, which requires the President to see that the laws are faithfully executed. Chief Executives have argued that a certain amount of secrecy is mandatory to give the President the necessary autonomy to discharge his duties. Since he cannot exercise all of his powers alone, it is urged that there is a derivative applicable to all the members of the executive branch, an assertion that is even more devastating to the checks-and-balances principle.

In 1962, President Kennedy attempted to end the practice of delegating to employees of the executive branch the authority to claim executive privilege. In his March 7, 1962, letter to the House Special Government Information Subcommittee of the Government Operations Committee, President Kennedy stated that the basic policy of his administration would be that only the President could invoke executive privilege, and that the privilege would not be used "without specific Presidential approval." Presidents Johnson and Nixon reaffirmed in writing this policy of limited exercise of executive privilege. Nevertheless, this theoretical control over the withholding of information does not operate satisfactorily in practice, and over the years Congress has encountered numerous instances of withholding of information essential in carrying out its constitutional powers.

Even if the issuance of the foregoing Presidential policy statements were to be taken as a statement of a policy which operates as well in practice as in theory, it would still be notable that the theory of the executive privilege has developed subject to the will of each succeeding President, and that there has been no legislative statement relating to its existence or exercise, nor have there been any definitive judicial decisions. The result has been that the formal or informal withholding of information from the Congress has become part and parcel of the growing power of the executive branch vis-a-vis the Congress.

This shifting of power away from the legislative branch and into the hands of the Executive has come about primarily from the failure of the Congress to assert and exercise its constitutional powers. This, in conjunction with the almost unlimited delegation of authority to the bureaucracy, has placed the Congress in the position of being the chief aggrandizer of the Executive. I fear that the resulting increase in executive power has come close to creating "a government of men, not of laws."

Aside from the enormous problems that refusals to provide information pose in terms of the separation of powers principle, the practice contravenes an underlying assumption of the Constitution; namely, that the free flow of ideas and information and the open and full disclosure of the governing process is essential to the operation of our democratic form of government. Any lessening in available information results in lessened citizen participation, and in a virtual absence of accountability on the part of those who govern. Thus it is plain that the exercise of the assumed power of executive privilege undergirds the growing policy of governmental secrecy that is so inimical to our freedoms.

Despite growing objections to this unwarranted use of executive power, the past months have seen no letup; indeed, only last month, during the hearings which my Subcommittee on Separation of Powers conducted in conjunction with an ad hoc subcommittee of the Government Operations Committee, it appeared that Secretary of Agriculture Earl Butz and Administrator William Ruckelshaus of the Environmental Protection Agency, under direction of the administration, would refuse to come and testify on the subject of executive impoundment of funds appropriated for programs to be carried out by the Department of Agriculture and the Environmental Protection Agency. Only after the subcommittees made it plain that the testimony of the two Government witnesses was essential to the inquiry, and that the subcommittees were prepared to issue subpoenas, if necessary, did the administration decide that it would be appropriate for these two officials to appear and present the testimony requested. Moreover, during the hearings held in the last Congress by my Subcommittee on Constitutional Rights on the reprehensible practice of Army surveillance over civilians, the subcommittee repeatedly requested information, documents, and the testimony of certain military officers. However, the subcommittee was refused consistently on the grounds, inter alia, that it had no need for the information or testimony requested, but at no time was the doctrine of executive privilege formally invoked by the President. There are numerous similar instances involving the head of

Federal departments and agencies. Thus it is not the formal invocation of executive privilege alone that causes difficulty, but the multitude of specious reasons given by department and agency heads and other officers and employees of the Federal Government for their refusals to provide the information sought by the Congress.

Additionally, I might note that the Washington Post, in a story dated March 3, 1973, reported that the President had told reporters at a press conference that he would invoke executive privilege if the Senate Judiciary Committee should request the appearance of his counsel, John W. Dean III, in regard to the nomination of L. Patrick Gray III to be the Director of the Federal Bureau of Investigation. Mr. Nixon reportedly stated that "No President could ever agree to allow the counsel to the President to go down and testify before a committee," making no distinction whatever between the various types of information that might be sought from such a person. While I recognize that there is a need for a President to seek counsel and advice from his closest staff members, and that such conversations on certain occasions necessarily must be kept confidential, it appears to me that the President's broadside statement that no President could ever agree to allow his counsel to testify represents the essence of the conflict between the President and the Congress.

In truth, it is an admission that the President and agency and department heads and employees are making unilateral decisions regarding the information that the Congress will be allowed to obtain in carrying out its constitutional duty to legislate and approve presidential appointments. Further, these unilateral determinations appear to be made with no reasonable discriminatory ground rules. I believe that the Congress and the President must cooperate in seeing that the American people receive the informed governance that they deserve and that they receive the necessary information regarding the operations of their Government, and that those who govern will, in turn, be accountable to the taxpayers.

In view of the continued reluctance of the President and employees and officials of Federal departments and agencies to provide the Congress with the information which it must have in order to legislate intelligently, I feel that it is essential that the Congress adopt some means of insuring that such refusals are well taken, and if not that they will cease, and the information needed by the legislative branch will be forthcoming from those who possess it.

It is for that reason that I urge the speedy adoption of the Senate joint resolution I introduce today. The resolution would provide for the Congress to require any Federal department or agency head or any officer or employee of the Federal Government to appear and answer and to produce all documents and other matter sought, unless the President formally invokes executive privilege, in which event the Congress—or any subcommittee, committee, or joint committee propounding the questions or seeking the documents or other matter—would make a factual determination whether the invocation of executive privilege is well taken. If it decides that the refusal is not well taken, it can then require the officer or employee to answer the questions propounded or to produce the materials requested. When any committee or subcommittee upholds or denies the invocation of executive privilege, it is required to file a resolution with its House of Congress—or a concurrent resolution with both Houses in the case of a joint committee or a subcommittee thereof—with a report of its proceedings relating to such invocation of executive privilege. The Congress or respective House thereof is empowered to take such action as it deems proper with respect to the disposition of such resolution.

I submit that this procedure would strongly discourage the abuse of the doctrine of executive privilege and would provide an essential procedure for the Congress to use in its apparently earnest effort to regain its rightful constitutional powers. I want to stress strongly that the introduction of this resolution is not a partisan matter, but that it is an attempt to enable the Congress to regain its rightful role under the Constitution.

It is mandatory for the survival of our system of government that we take all reasonable measures to insure that the separation of powers principle survives, for if it does not, the basis of our freedoms will have retreated into history.



83<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. J. RES. 72

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IN THE SENATE OF THE UNITED STATES

MARCH 8, 1973

Mr. ERVIN introduced the following joint resolution; which was read twice  
and referred to the Committee on the Judiciary

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## JOINT RESOLUTION

To insure the separation of Federal powers and to protect the legislative function by providing a procedure for requiring Federal officers and employees to inform the Congress.

Whereas Congress must be fully informed of the facts and premises upon which proposed actions of the United States Government are based if it is to exercise its constitutional responsibility in enacting the laws and appropriating the budget authority of the United States Government;

Whereas heads of departments and agencies of the United States, and officers and employees of the United States, have on past occasions refused to appear and to testify and produce documents and other matter and to inform Congress when requested to do so by the Congress, either House of Congress, its joint committees, committees of either House, or subcommittees thereof, thereby causing a grievous erosion of the checks and balances prescribed by the Constitution;

II

Whereas such heads of departments and agencies of the United States, and officers or employees of the United States have asserted that their refusal to appear and to testify or produce documents or other matter before such committees and subcommittees has been based upon the notion of privileged communications between the President and the officials requested to appear and to testify or to produce documents and other matter; and

Whereas there is a pressing need to terminate this erosion and to insure the separation of Federal powers and to protect the legislative function: Now, therefore, be it

1       *Resolved by the Senate and House of Representatives*  
2       *of the United States of America in Congress assembled,*  
3       That, when any such head of a department or agency of the  
4       United States, or officer or employee of the United States  
5       is summoned and requested to testify or to produce docu-  
6       ments or any other matter before the Congress, either House  
7       of Congress, any joint committee of Congress, any committee  
8       of either House, or any subcommittee thereof, that depart-  
9       ment or agency head or officer or employee shall appear and  
10      answer all questions propounded to him, and produce all docu-  
11      ments and other matter sought, unless the President formally  
12      invokes executive privilege in writing and expressly in-  
13      structs the officer or employee to refuse to appear or to re-  
14      fuse to answer specific questions, or to produce specific docu-  
15      ments or other matter, with respect to a specific item, in  
16      which event it shall then be a question of fact for the Con-



1 gress, House of Congress, joint committee, committee or sub-  
2 committee proposing the questions or seeking the docu-  
3 ments or other matter to decide whether the invocation of  
4 executive privilege is well taken. If it is decided that the  
5 invocation is not well taken, the officer or employee shall be  
6 ordered to appear and to answer the question or questions  
7 propounded and produce any documents or other matter  
8 requested.

9 SEC. 2. When the Congress, either House of Congress,  
10 joint committee, committee, or subcommittee upholds or de-  
11 nies the invocation of executive privilege, it shall, within ten  
12 days, file—

13 (1) in the case of a joint committee, a concurrent  
14 resolution with both Houses of Congress; and

15 (2) in the case of a committee or subcommittee, a  
16 resolution with its House of Congress;

17 with a report and record of its proceedings relating to such  
18 invocation of executive privilege. Congress, in the case of  
19 any such concurrent resolution, and the House of Congress  
20 with whom any such resolution is filed, shall take such action  
21 as it deems proper with respect to the disposition of such  
22 concurrent resolution or resolution.

[From the Congressional Record, June 8, 1973]

## REMARKS OF SENATOR ERVIN ON INTRODUCING SENATE CONCURRENT RESOLUTION 30

### PRODUCTION OF INFORMATION BY FEDERAL OFFICERS AND EMPLOYEES

Mr. ERVIN. Mr. President, on behalf of Senator MUSKIE and myself, I submit for appropriate reference a concurrent resolution to establish a procedure assuring Congress the full and prompt production of information requested from Federal officers and employees.

This resolution is similar in content and purpose to Senate Joint Resolution 72 which I introduced on March 8, 1973, but it has been altered in several important ways, primarily as a result of extensive hearings conducted in April and May by the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Judiciary Subcommittees on Separation of Powers and Administrative Practice and Procedure.

The resolution provides that when an officer or employee of the executive branch is summoned and requested to testify or to produce information, records, documents, or other material before either House of Congress or any committee or subcommittee thereof, that officer or employee shall appear pursuant to the request made of him and shall answer all questions propounded to him and shall produce all information sought unless the President formally and expressly instructs him in writing to refuse to appear or to provide the information.

In the event of a Presidential refusal, the written instruction shall set forth the grounds on which the refusal is based. Such written instruction shall be transmitted to the House, or committee or subcommittee thereof, requesting the information or appearance.

The appropriate House, committee, or subcommittee seeking the appearance or information shall determine whether or not such a Presidential instruction is without foundation in law. When a committee or subcommittee finds that the refusal is without foundation in law, then the appropriate House or committee shall order the official or employee to appear and to answer the questions or provide the information.

When a committee or subcommittee determines that a Presidential instruction to withhold information is without foundation in law, it shall file within 10 days an appropriate resolution with its respective House with a report and record of its proceedings relating to the Presidential instruction. The respective House shall take such action as it deems proper with respect to the disposition of the appropriate resolution.

This resolution differs in two respects from Senate Joint Resolution 72 which I introduced earlier this year.

First, it does not mention the term "executive privilege" which has been used by the Executive as a disguise for a variety of refusals to provide information requested by Congress. I do not believe that it is necessary for Congress to put a stamp of approval—whether expressly or by implication—on such a "privilege." Rather, Congress should review Presidential refusals to provide information and determine whether or not they are founded in law, which would include a proper exercise of privilege or authority granted by statute.

Second, it takes the form of a concurrent resolution rather than a joint resolution. The intent and purpose is to create an internal congressional procedure by which Congress will exercise the powers and prerogatives which properly belong to it; it would not have legislative effect and therefore would not be subject to a Presidential veto.

This resolution and the improvements incorporated in it are the outgrowth of the extensive hearings on executive privilege and Government secrecy being conducted this year by the subcommittees I mentioned earlier. Those hearings pointed out the extent to which the failure or outright refusal of Federal officers and employees to produce information requested by Congress in carrying out its constitutional function to legislate has resulted in a serious erosion in the separation of powers doctrine embodied in the Constitution.

I am sure that many Senators and other American citizens were shocked on April 10, when the then Attorney General, Richard G. Kleindienst, testified that the President could extend the doctrine of executive privilege to prohibit any and all of the 2.5 million employees of the executive branch from testifying or providing information to Congress. Although the administration has since indicated that it does not intend to exercise the privilege so broadly, especially in connec-



tion with the Watergate investigation, such a sweeping assertion of the scope of the privilege must make us wonder if the President and his assistants have any respect at all for the separation of powers doctrine.

Congress must not stand idly by and allow the President to stretch Executive privilege to cover every operation of the executive branch. I respect the right of the Executive insofar as executive privilege is confined to communications between Presidential aides or other executive employees and the President, or with respect to communications of a confidential nature between different Presidential aides or executive employees when they are assisting the President in carrying out the duties of his Office. But I do not think there is any privilege that exists to withhold information about matters that have already been made public by other administration officials or with respect to official dealings between Presidential aides and third persons.

In other words, executive privilege should be used in very narrow contexts, and when it is used, Congress must determine whether it is exercised properly. The procedure which would be established by this resolution would merely insure Congress the opportunity to make that determination.

I submit that the procedure created by this resolution would strongly discourage the abuse of the doctrine of executive privilege and would provide an essential procedure for Congress to use in its effort to regain its rightful constitutional powers.

Mr. President, I ask unanimous consent that the text of this concurrent resolution be printed in the RECORD.

There being no objection, the concurrent resolution was ordered to be printed in the RECORD, as follows :

93<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. CON. RES. 30

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IN THE SENATE OF THE UNITED STATES

JUNE 8, 1973

Mr. ERVIN (for himself and Mr. MUSKIE) submitted the following concurrent resolution; which was referred to the Committee on Government Operations

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## CONCURRENT RESOLUTION

To establish a procedure assuring Congress the full and prompt production of information requested from Federal officers and employees.

Whereas the denial to either House of Congress, to its joint committees, committees and subcommittees by officers or employees of the United States of any information, including testimony, records or documents, or other material, requested by the Congress in the performance of its functions erodes the system of checks and balances prescribed by the Constitution, unless grounds sufficient in law are asserted for such denials: Now, therefore, be it

- 1       *Resolved by the Senate (the House of Representatives*
- 2       *concurring)*, That, when an officer or employee of the
- 3       United States is summoned and requested to testify or to



1 produce information, records, documents, or other material  
2 before either House of Congress, any joint committee of  
3 Congress, any committee of either House or any subcom-  
4 mittee thereof, that officer or employee shall appear pur-  
5 suant to a request specifying the time and the place and  
6 shall answer all questions propounded to him, and produce  
7 all information, including records, documents, and other ma-  
8 terial sought, unless the President formally and expressly  
9 instructs the officer or employee in writing to refuse to pro-  
10 vide the information requested, including answers to specific  
11 questions, or specific records, documents, or other material,  
12 in which event such Presidential instruction shall set forth  
13 the grounds on which the refusal is based. Such written in-  
14 struction shall be transmitted to the House of Congress,  
15 joint committee, committee, or subcommittee requesting the  
16 information, proposing the questions or seeking the records,  
17 documents, or other material, which shall then determine  
18 whether or not the Presidential instruction is without founda-  
19 tion in law. If it is determined that the instruction is with-  
20 out foundation in law, the officer or employee shall be ordered  
21 to appear at a time specified before the House of Congress,  
22 joint committee, committee, or subcommittee and to pro-  
23 vide there the information requested by answering the ques-  
24 tion or questions propounded and producing any official  
25 information, including records, documents, or other ma-  
26 terial requested.

## 3

1        SEC. 2. When a joint committee of the Congress, or a  
2 committee, or subcommittee of either House of Congress  
3 determines that a Presidential instruction to withhold infor-  
4 mation requested by it is without foundation in law, it shall,  
5 within ten days, file—

6            (1) in the case of a joint committee, a concurrent  
7 resolution with both Houses of Congress; and

8            (2) in the case of a committee or subcommittee, a  
9 resolution with its House of Congress;

10 with a report and record of its proceedings relating to such  
11 Presidential instruction. Congress, in the case of any such  
12 concurrent resolution, and the House of Congress with whom  
13 any such resolution is filed, shall take such action as it deems  
14 proper with respect to the disposition of such concurrent  
15 resolution or resolution.



[From the Congressional Record, Mar. 6, 1973]

## REMARKS OF SENATOR PERCY ON INTRODUCING S. 1106

Mr. PERCY. Mr. President, Congress enacted the Federal Reports Act in 1942 to cut bureaucratic inefficiency and curb Government harassment of small business. But in the ensuing years, under several administrations, the Budget Bureau and its latter-day successor, the Office of Management and Budget, has misread congressional intent. Using the Federal Reports Act, OMB largely controls the investigatory functions of Federal agencies.

The Federal Reports Act emerged during World War II crisis years. Massive Government information-gathering accompanied price controls and rationing. People waited in long lines occasioned in part by paperwork, overkill, and red-tape. Congress acted quickly to alleviate the situation. Unwittingly, it gave the then Bureau of the Budget broad discretionary authority over Government information gathering.

Federal agencies, under the act, must now receive OMB approval for collecting identical information from more than nine persons or business firms. Agencies send their questionnaires to OMB for review. OMB industry advisory committees—composed of representatives of big business rather than the small businesses the act was designed to protect—screen the data requests. Whole questions or series of questions can be stricken from the questionnaires. Information requests can be denied altogether, or as happens more commonly, requests are delayed until the desired information is no longer relevant or necessary. In the end, OMB decides what information the Government can gather, at least as to situations covered by the Federal Reports Act.

There is a clear conflict of interest. Representatives from the firms and industries affected select which questions the Government can ask. Moreover, there is no time limitation as to the length of time OMB can withhold its approval. Indeed, OMB can delay a questionnaire indefinitely. Denial of information merits no explanation whatsoever. And, at least until recently, most OMB advisory committee meetings have been conducted in secret. It is expected that passage last year of the Federal Advisory Committee Act—Public Law 92-463—will correct that unhealthy situation.

Delay tactics abound. Testimony offered during hearings of the Subcommittee on Intergovernmental Relations last year indicated that the national waste inventory survey was detained 7 years by OMB-sanctioned devices. The OMB advisory committee reportedly favored granting corporate property rights over poison effluents. No Federal agency could then survey an industry's waste chemicals.

Congress designed the Federal Reports Act to halt uneconomic duplication by information-gathering agencies and to insulate small businesses from burdensome Government inquiries. Present delay procedures are, however, costly. The consequence of affording immunity to probing investigations, as into monopolistic behavior or anticompetitive conduct, can mean even greater harm to small businesses.

To be effective, Federal agencies require reasonable investigatory privileges. Where a request is unreasonable, it should explain any such actions. Otherwise, delay is default. I am, therefore, introducing this measure to appropriately limit the OMB review period to 60 days and require a full explanation for any disapproval of information requests by agencies.

Many Americans lack faith in the Federal Government. Many believe that information is deliberately being suppressed. A free government must merit public respect. A first step in that direction is to be willing to explain its actions and to conduct its affairs in public view. Those who operate in the public's name should operate in the public view.

If Government cannot assemble accurate and needed information without undue interference, it cannot govern effectively.

I call the attention of my colleagues to the fact that the provisions of this legislation were incorporated last year in my Federal Advisory Committee bill, which was unanimously approved by this body. This section, however, was knocked out in the House-Senate conference as being nongermane to the subject matter at issue. Since in fact the provisions apply not only to advisory committees but to all agencies of Government, I believe that separate legislation at this time is appropriate to accomplish the stated purposes.

Mr. President, I ask unanimous consent that the text of the bill be printed at this point in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

93<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 1106

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## IN THE SENATE OF THE UNITED STATES

MARCH 6, 1973

MR. PERCY introduced the following bill; which was read twice and referred to the Committee on Government Operations

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## A BILL

To amend the Federal Reports Act to avoid undue delays in the collection of information by Government agencies.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       SECTION 1. Section 8509 of title 44, United States Code,  
4       is amended by inserting “(a)” before the words “A Federal  
5       agency” and by adding at the end thereof the following  
6       new subsections:

7       “(b) A determination of disapproval by the Director  
8       shall be accompanied by a full statement of the reasons  
9       therefor.

10       “(c) Any collection of information which has been re-  
11       ferred to the Director of the Office of Management and



1 Budget for his approval under section 3506 of this title or  
2 under subsection (a) of this section shall be approved or  
3 denied within sixty days or such approval shall be deemed  
4 to have been granted.”

## AGENCY COMMENTS

(S. 1106)

DEPARTMENT OF JUSTICE,  
Washington, D.C., July 10, 1973.

Hon. EDMUND S. MUSKIE,

*Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1106, a bill "To amend the Federal Reports Act to avoid undue delays in the collection of information by Government agencies."

The bill would require the Director of the Office of Management and Budget to specify reasons for disapproving an agency's proposal to collect certain types of information and to make his decision whether to approve or disapprove within sixty days.

Whether this bill should be enacted involves considerations as to which the Department of Justice defers to the Office of Management and Budget. That Office has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Cordially,

MIKE McKEVITT.

OFFICE OF MANAGEMENT AND BUDGET,  
Washington, D.C., June 29, 1973.

Hon. EDMUND S. MUSKIE,

*Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR SENATOR MUSKIE: This letter is in response to yours of March 28 to the Director, requesting a report on S. 1106, a bill to "amend the Federal Reports Act to avoid undue delays in the collection of information by Government agencies."

S. 1106 would require the Director to provide a full statement of reasons for disapproving a Federal agency request to collect information and would require him to approve or deny such a request within 60 days "or such approval shall be deemed to have been granted."

The Federal Reports Act declares it to be the policy of the Congress that "information which may be needed by the various Federal agencies should be obtained with a minimum burden upon business enterprises (especially small business enterprises) and other persons required to furnish such information, and at a minimum cost to the Government, that all unnecessary duplication of efforts in obtaining such information . . . should be eliminated as soon as practicable; and that information collected and tabulated by any Federal agency should insofar as it is expedient be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public."

As one of the ways of securing these policy objectives, the Act provides that no Federal agency "shall conduct or sponsor the collection of information, upon identical items, from ten or more persons (other than Federal employees considered as such) unless, in advance of such collection . . . the Director [of the Office of Management and Budget] shall have stated that he does not disapprove of such collection."

The proposed amendment requiring the Director to furnish reasons for disapproving a request to collect information from the public would place in law that which has been OMB practice for the entire period of the existence of the Federal Reports Act. Since the objectives of the amendment are already being achieved and has been achieved for over 30 years, there seems little purpose in its enactment.

The proposed amendment providing that approval of a proposal to collect information "shall be deemed to have been granted" in the absence of action by the Director within 60 days would subordinate the declared policy of Congress to the imperative of an arbitrary time period. While only about 5 percent of all proposals received require more than 60 days for review, they are most frequently the kinds of proposals which involve major issues of duplication, reporting burden, and interagency coordination. Sometimes issues of this nature cannot be resolved within 60 days. Should S. 1106 be enacted, the Director would be required to disapprove proposals simply because important issues could not be resolved within the arbitrary time period specified by law. Thus, ironically a law, whose basic purpose is to hold down paperwork, would itself become a vehicle to



further increase it and an amendment proposed to avoid undue delays in the collection of needed information may serve as a means of increasing such delays.

This proposed amendment would make it more difficult to use the advisory committee procedure to obtain advice from respondents on a reporting proposal. An advisory committee meeting requires advance notice of about three weeks in order to assure availability of space, availability of materials, and adequate public notice in the *Federal Register* as required by the Advisory Committee Act of 1972. Given this lead time required to set up an advisory committee meeting, little time would be left to consider comments and criticisms offered.

Finally, the proposed amendment serves to cloud and confuse the purposes of Congress as to policy regarding the collection of information from the public. Where the present policy is clear and unambiguous, this amendment proposed in S. 1106 would abandon the purposes of the Federal Reports Act in every case in which it might take longer than 60 days to achieve them.

For these reasons it is recommended that S. 1106 not be enacted.

Sincerely,

WILFRED H. ROMMEL,  
Assistant Director for  
Legislative Reference.

THE GENERAL COUNSEL OF THE TREASURY,  
Washington, D.C., July 2, 1973.

Hon. EDMUND S. MUSKIE,  
Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1106. "To amend the Federal Reports Act to avoid undue delays in the collection of information by Government agencies."

Under the provisions of the Federal Reports Act, Federal agencies must receive approval from the Office of Management and Budget before they may collect identical information from ten or more persons, other than Federal employees. The proposed legislation would amend the Act (1) to require the Director of the Office of Management and Budget, when he disapproves of an agency request to set forth his reasons therefor, and (2) to provide that approval or denial of an agency request must be made within sixty days of submission or approval shall be deemed to have been granted.

The Department concurs in the objective of the bill. We defer, however, to the views of the Office of Management and Budget on the means of accomplishing that objective.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Subcommittee.

Sincerely yours,

EDWARD C. SCHMULTS,  
General Counsel.

[From the Congressional Record, Mar. 8, 1973]

#### REMARKS OF SENATOR MUSKIE ON INTRODUCING S. 1142

Mr. MUSKIE. Mr. President, these amendments which are cosponsored by 13 Senators from both sides of the aisle respond to a call many of us have heard for full implementation of the people's right to know the way in which they are governed. This bill, the result of intensive investigation in the 92d Congress by Representative William Moorhead's Subcommittee on Foreign Operations and Government Information, is a major contribution to answering that demand.

We are the best-informed of nations and the worst-informed. Americans in 1973 have access to more data, statistics, studies and opinions than the citizens of any other democracy, including their own, have ever had before. In theory, our people have available to them all the information they need to make wise and intelligent choices on public policy.

In practice, however, the flow of vital information from the governors to the governed is controlled and restricted by considerations that are alien to our concept of open democracy. The Executive asserts the power to withhold from the people and from the Congress some or all of the expert advice it receives and acts on. A President or his spokesman can make public those facts which best support a decision he has already made and can conceal arguments for alternatives he has rejected.

One branch of the Armed Forces can keep its research secret from the others, putting its competitive drive for appropriations ahead of the public interest in efficiency. Officials in charge of regulating prices or communications or pollution or consumer safety can be subjected to secret influences whose power to affect decision is increased by their ability to operate behind closed doors and to lock their advice into closed files.

Arguments made in private may be persuasive. They may even be correct. But where the public interest is at stake, argument must be open so that it can be rebutted. To be enforceable in a society built on trust, decisions must be reached in a manner that permits all those concerned to have equal access to the decisionmakers.

These amendments go far to remove obstructions which many Federal agencies have put in the way of those citizens who seek to know. They provide that judges shall question the reasons asserted by an executive agency for claiming the privilege of secrecy for its records and shall examine the records themselves to see how reasonable each claim is. They affirm the right of Congress to have access to the information on which the Executive deliberates and acts.

I am proud to bring this legislation before the Senate at the same time it goes before the other body. Together we can examine the problems which have arisen in implementing the sound purpose of the Freedom of Information Act and can work to strengthen that purpose and our democracy.

Mr. President, I ask unanimous consent that an analysis of these amendments and the text of the bill be printed in the CONGRESSIONAL RECORD at this point.

There being no objection, the analysis and bill were ordered to be printed in the RECORD, as follows:

“ANALYSIS OF AMENDMENTS TO THE FREEDOM OF INFORMATION ACT OF 1967

“*Amendments to Section 552(a)*—

“(1) agencies would be required to publish and distribute their opinions made in the adjudication of cases, policy statements and interpretations adopted, and administrative staff manuals and instructions to staff that affect the public, rather than merely making them “available for public inspection and copying,” as provided in the present law.

“(2) agencies would be required to respond to requests for records which “reasonably describe such records.” This language is substituted for the term “identifiable records,” which has been used by the bureaucracy in many cases to avoid making information available.

“(3) agencies would be required to respond to requests under the Act within 10 days (excepting Saturdays, Sunday, and legal public holidays) after receipt of the request and within 20 days (with the same exceptions) on administrative appeals following denials to the requesting party. These time periods are the result of a 1971 study and recommendations on improving the operation of the Act as adopted by the Administrative Conference of the United States to correct one of the most glaring deficiencies uncovered during oversight hearings—that of agency stalling and foot-dragging tactics to avoid disclosure.

“(4) the Government could be required by the courts to pay ‘reasonable attorney fees and other litigation costs’ of citizens who successfully litigate cases under the Act. This amendment is directed toward another major deficiency of the present law revealed during the hearings—the high costs to the average citizen when attempts to obtain records under provisions of the Act are frustrated by arbitrary or capricious acts of the bureaucracy or by foot-dragging tactics. Such assessment would be at the option of the court and has been successfully used in numerous civil rights cases in past years.

“(5) agencies would be required to file answers and other responsive motions to citizens’ suits under the Act within 20 days after receipt. Under normal rules of Federal civil procedure, the Government is given 60 days to file such responses, although the private citizen has only 20 days to respond to Government motions: this amendment would plug a major loophole used by the Government, and revealed in the hearings, involving cases where repeated filing of delaying motions by the Government stalled court consideration of Freedom of Information Act cases for as long as 140 days. Such stalling tactics make a mockery of the law and often make the information, if finally made available to the citizen, virtually useless to him.

“(6) new provisions proposed to Section 552(a) would clarify the original intent of Congress in connection with the interpretation of the ‘de novo’ require-



ments placed on the courts in their consideration of cases under the Act. Such amendment is made necessary by the Supreme Court's decision in the case of *Mink v. EPA* (410 U.S. —), decided on January 22, 1973, when the Court held that judges *may not* examine *in camera* documents in dispute where the Government claims secrecy by virtue of exemption 552(b)(1), dealing with the national defense or foreign policy, and are *not required* to exercise such *in camera* judgment in cases involving exemption 552(b)(5), dealing with inter-agency or intra-agency memorandums. The amendments make it clear that Congress intended and still intends that 'de novo' as used in the law means that since the burden of proof for withholding is on the Government, courts *must* examine agency records *in camera* to determine if such records as requested by the plaintiff in a suit under the Act, or any part thereof, should be withheld under any of the nine permissive exemptions of 552(b). It also makes it clear in cases where exemption 552(b)(1) is claimed by the agency, the court *must* examine such classified records to see if they are a proper exercise of such Executive order classification authority and that disclosure of the information requested would actually be 'harmful to the national defense or foreign policy of the United States.'

*"Amendments to Section 552(b) —*

"(1) permissive exemption (b)(2) would be amended to require disclosure of information about an agency's internal personnel rules and internal personnel practices, so long as such disclosure would not "unduly impede the functioning of such agency."

"(2) permissive exemption (b)(4) would be amended to modify the exemption for trade secrets by requiring that such types of information be truly privileged and confidential, as is already provided in the case of commercial or financial information under this exemption.

"(3) permissive exemption (b)(6) would be amended to limit its application to medical personnel 'records,' instead of 'files' as in the present law; this would close another loophole in the Act whereby releasable information is often commingled with other types of information in a single 'file', and therefore withheld.

"(4) permissive exemption (b)(7) would also be amended to substitute the word 'records' for 'files' as in (b)(6), for the same reason—to curb agency commingling of information to avoid public disclosure. The amendment would also narrow the exemption to require that such records be compiled for a 'specific law enforcement purpose, the disclosure of which is not in the public interest.' It also enumerates certain categories of information that *cannot* be withheld under this exemption such as scientific tests, reports, or data, inspection reports relating to health, safety, or environmental protection, or records serving as a basis for a public policy statement of any agency, officer, or employee of the United States, or which serve as a basis for rule-making by an agency.

*"Amendment to Section 552(c) —*

"(1) the amendment proposed to section (c) clarifies the position that Congress, upon written request to an agency, be furnished all information or records by the Executive that is necessary for Congress to carry out its functions. Language in the present law merely states that the Freedom of Information Act does not authorize 'withholding of information from Congress.'

*"New Section 552(d) —*

"(1) establishes a mechanism for congressional oversight by requiring annual reports from each agency on their record of administration of the act, requiring certain record of administration of the act, requiring certain types of statistical data, changes in their regulations, and similar types of information."

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[From the Congressional Record, Mar. 8, 1973]

## REMARKS OF SENATOR KENNEDY ON FREEDOM OF INFORMATION ACT (S. 1142)

Mr. KENNEDY. Mr. President, James Madison once wrote :

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."

These words were quoted upon introduction and reporting of what is now the Freedom of Information Act, legislation intended to provide the citizenry with the "means of acquiring" information from its government.

Congress' overriding concern in passing the Freedom of Information Act—FOIA—was that disclosure of information be the general rule, not the exception. The act reversed previous law and practice in that it provided that all persons have equal rights of access and that the burden be placed on government to justify refusal to disclose information, not the person requesting it. Finally, the act allowed persons wrongfully denied access to documents the right to seek injunctive relief in the courts.

After almost 6 years of operation, the FOIA has not fulfilled Congress' objectives or aspirations. Bureaucrats who simply feel more comfortable laboring behind closed doors and officials who desire to cover up inefficiency, ineffectiveness, laziness, and even corruption have joined to frustrate the intent and circumvent the mandates of the act. Vague or ambiguous exemptions have been stretched to shield disclosure of even the most innocuous documents, while delays and runarounds are employed to dampen the ardor of public inquirers.

Clearly the time has come for a new look and update of the FOIA. The amendments developed from extensive hearings in a House Government Operations Subcommittee during the last Congress provide an excellent starting point to initiate this revision. I am pleased to join with Senator Muskie and others today in introducing these amendments.

The original FOIA was developed from extensive hearings and deliberations by the Senate Subcommittee on Administrative Practice and Procedure, which I now chair. Because the amendments being introduced here cover not only areas presently included in the FOIA, but also matters relating to disclosure of previously classified materials and to access by Congress to documents in agency files, a joint referral has been arranged to both the Judiciary and the Government Operations Committees. I will look forward to coordinating the efforts of my subcommittee with those of Senators Muskie and Ervin, so that we might develop unified positions with regard to the important problems addressed by these amendments.



93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 1142

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## IN THE SENATE OF THE UNITED STATES

MARCH 8, 1973

Mr. MUSKIE (for himself, Mr. BIBLE, Mr. CHILES, Mr. EAGLETON, Mr. GRAVEL, Mr. HART, Mr. HUGHES, Mr. HUMPHREY, Mr. JAVITS, Mr. KENNEDY, Mr. METCALF, Mr. MONDALE, Mr. PERCY, and Mr. RIBICOFF) introduced the following bill; which was read twice and referred, by unanimous consent, to the Committees on the Judiciary and Government Operations

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## A BILL

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       SECTION 1. (a) The fourth sentence of section 552 (a)  
4       (2) of title 5, United States Code, is amended by striking  
5       out "and make available for public inspection and copying"  
6       and inserting in lieu thereof " , promptly publish, and dis-  
7       tribute (by sale or otherwise) copies of".

8       (b) Section 552 (a) (3) of title 5, United States Code,  
9       is amended by striking out "on request for identifiable rec-  
10      ords made in accordance with published rules stating the

1 time, place, fees, to the extent authorized by statute, and  
2 procedure to be followed,” and inserting in lieu thereof the  
3 following: “upon any request for records which (A) reason-  
4 ably describes such records, and (B) is made in accordance  
5 with published rules stating the time, place, fees, to the  
6 extent authorized by statute, and procedures to be followed,”.

7 (C) Section 552 (a) of title 5, United States Code, is  
8 amended by adding at the end thereof the following new  
9 paragraph:

10 “(5) Each agency, upon any request for records made  
11 under paragraph (1), (2), or (3) of this subsection, shall—

12 “(A) determine within ten days (excepting Satur-  
13 days, Sundays, and legal public holidays) after the re-  
14 ceipt of any such request whether to comply with such  
15 request and shall immediately notify the person making  
16 such request of such determination and the reasons  
17 therefor;

18 “(B) in the case of a determination not to comply  
19 with any such request, immediately notify the person  
20 making such request that such person has a period of  
21 twenty days (excepting Saturdays, Sundays, and legal  
22 public holidays), beginning on the date of receipt of such  
23 notification, within which to appeal such determination  
24 to such agency; and

25 “(C) make a determination with respect to such .



1        appeal within twenty days (excepting Saturdays, Sun-  
2        days, and legal public holidays) after the receipt of such  
3        appeal.

4        Any person making a request to an agency for records under  
5        paragraph (1), (2), or (3) of this subsection shall be  
6        deemed to have exhausted his administrative remedies with  
7        respect to such request if the agency fails to comply with sub-  
8        paragraph (A) or subparagraph (C) of this paragraph.  
9        Upon any determination by an agency to comply with a re-  
10       quest for records, such records shall be made available as  
11       soon as practicable to such person making such request."

12       (d) (1) The third sentence of section 552 (a) (3) of  
13       title 5, United States Code, is amended by inserting immedi-  
14       ately after "the court shall determine the matter de novo"  
15       the following: "including by examination of the contents of  
16       any agency records in camera to determine if such records or  
17       any part thereof shall be withheld under any of the exemp-  
18       tions set forth in subsection (b) and the burden is on the  
19       agency to sustain its action."

20       (2) Section 552 (a) (3) of title 5, United States Code,  
21       is amended by inserting the following new sentence im-  
22       mediately after the third sentence thereof: "In the case of  
23       any agency records which the agency claims are within the  
24       purview of subsection (b) (1), such in camera investiga-  
25       tion by the court shall be of the contents of such records in

1 order to determine if such records, or any part thereof, can-  
2 not be disclosed because such disclosure would be harmful  
3 to the national defense or foreign policy of the United  
4 States.”

5 (e) Section 552 (a) (3) of title 5, United States Code,  
6 is amended by adding at the end thereof the following new  
7 sentence: “Notwithstanding any other provision of law,  
8 the United States or an officer or agency thereof shall serve  
9 an answer to any complaint made under this paragraph  
10 within twenty days after the service upon the United States  
11 attorney of the pleading in which such complaint is made.  
12 The court may assess against the United States reasonable  
13 attorney fees and other litigation costs reasonably incurred  
14 in any case under this section in which the United States  
15 or an officer or agency thereof, as litigant, has not pre-  
16 vailed.”

17 SEC. 2. (a) Section 552 (b) (2) of title 5, United  
18 States Code, is amended by inserting “internal personnel”  
19 immediately before “practices”, and by inserting “and the  
20 disclosure of which would unduly impede the functioning  
21 of such agency” immediately before the semicolon at the  
22 end thereof.

23 (b) Section 552 (b) (4) of title 5, United States  
24 Code, is amended by inserting “obtained from a person  
25 which are privileged or confidential” immediately after



1 “trade secrets”, and by striking out “and” the second time  
2 that it appears therein and by inserting in lieu thereof  
3 “which is”.

4 (c) Section 552 (b) (6) of title 5, United States Code,  
5 is amended by striking out “files” both times that it appears  
6 therein and inserting in lieu thereof “records”.

7 (d) Section 552 (b) (7) of title 5, United States Code,  
8 is amended to read as follows:

9 “(7) investigatory records compiled for any specific  
10 law-enforcement purpose the disclosure of which is not  
11 in the public interest, except to the extent that—

12 “(A) any such investigatory records are avail-  
13 able by law to a party other than an agency, or

14 “(B) any such investigatory records are—

15 “(i) scientific tests, reports, or data,

16 “(ii) inspection reports of any agency  
17 which relate to health, safety, environmental  
18 protection, or

19 “(iii) records which serve as a basis for  
20 any public policy statement made by any  
21 agency or officer or employee of the United  
22 States or which serve as a basis for rulemaking  
23 by any agency;”.

24 SEC. 3. Section 552 (c) of title 5, United States Code, is  
25 amended to read as follows:

1       “(e) (1) This section does not authorize withholding  
2 of information or limit the availability of records to the pub-  
3 lic, except as specifically stated in this section.

4       “(2) (A) Notwithstanding subsection (b), any agency  
5 shall furnish any information or records to Congress or any  
6 committee of Congress promptly upon written request to the  
7 head of such agency by the Speaker of the House of Repre-  
8 sentatives, the President of the Senate, or the chairman of  
9 any such committee, as the case may be.

10       “(B) For purposes of this paragraph, the term ‘com-  
11 mittee of Congress’ means any committee of the Senate or  
12 House of Representatives or any subcommittee of any such  
13 committee or any joint committee of Congress or any sub-  
14 committee of any such joint committee.”

15       SEC. 4. Section 552 of title 5, United States Code, is  
16 amended by adding at the end thereof the following new  
17 subsection:

18       “(d) Each agency shall, on or before March 1 of each  
19 calendar year, submit a report to the Committee on Govern-  
20 ment Operations of the House of Representatives and the  
21 Committee on Government Operations of the Senate which  
22 shall include—

23               “(1) the number of requests for records made to  
24 such agency under subsection (a) ;

25               “(2) the number of determinations made by such



1       agency not to comply with any such request, and the  
2       reasons for each such determination;

3           “(3) the number of appeals made by persons under  
4       subsection (a) (5) (B) ;

5           “(4) the number of days taken by such agency to  
6       make any determination regarding any request for rec-  
7       ords and regarding any appeal;

8           “(5) the number of complaints made under sub-  
9       section (a) (3) ;

10          “(6) a copy of any rule made by such agency re-  
11       garding this section; and

12          “(7) such other information as will indicate efforts  
13       to administer fully this section;  
14       during the preceding calendar year.”

15       SEC. 5. The amendments made by this Act shall take  
16       effect on the ninetieth day after the date of enactment of  
17       this Act.

## AGENCY COMMENTS

(S. 1142)

DEPARTMENT OF JUSTICE,  
Washington, D.C., July 12, 1973.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Subcommittee on Separation of Powers, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

Hon. EDMUND S. MUSKIE,  
*Chairman, Subcommittee on Intergovernmental Relations, Committee on Gov-*  
*ernment Operations, Washington, D.C.*

Hon. EDWARD M. KENNEDY,  
*Chairman, Subcommittee on Administrative Practice and Procedure, Committee*  
*on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MESSRS. CHAIRMEN: In his appearance before your subcommittee on June 26, 1973, Attorney General Richardson pledged to provide you with a more detailed explanation of the Department's views on S. 1142, a bill to amend the Freedom of Information Act. This is in response to that pledge.

S. 1142 is basically designed to make the Act as clear as possible, and to make government records even more quickly and fully available than at present. We are, of course, sympathetic to those purposes and wish to reiterate the Department's firm commitment to ensuring the vitality of the public's "right to know" to the greatest extent consistent with sound government. However, as the Attorney General explained, albeit in a larger context: "Secrecy is . . . a paradox. It is a threat as well as a necessary incident to democratic government." The Freedom of Information Act is directed to balancing these competing principles by the general rule, yielding only to such compelling considerations as those provided for in the Act's exemptions. As enacted, the Act imposes an affirmative obligation on the Executive branch not to withhold access to government information unless it is specifically exempted by the Act and its release would not be in the public interest.

Based upon our broad experience in this area, it is our view that the principle solution to the problem of providing more public access to government documents and information lies not so much in revising the language of the Act, as in improving administrative compliance with its present provisions.

To this end, the Attorney General stated before your subcommittees that the Department is considering several ways to ensure greater compliance, including conducting training seminars and publishing freedom of information manuals or newsletters. In addition, he announced that four steps would be taken now to encourage better administration of the Act. These steps include: (1) a request to the Civil Service Commission to include freedom of information material in its training programs; (2) an interagency symposium to be conducted by the Department before the end of the year on the Freedom of Information Act in which ideas on how to improve administration will be discussed; (3) establishment of a task force to study how the Executive branch can better organize itself to administer the Act; and (4) a reminder to the various federal agencies of their responsibility to consult with the Department's Freedom of Information Committee before issuing final denials of requests under the Act and an order to the Department's litigating divisions not to defend a law suit unless this procedure has been followed. Taken together, these measures represent a concerted effort to ensure that no more information is withheld than is absolutely essential.

In view of the recent development of these proposals to increase compliance with the Act, we believe it would be reasonable to delay extensive amendment of the Act until these programs can be implemented and their results evaluated.

Apart from these general observations on the need and utility of amending the present Act, the Department has the following comments and recommendations concerning the provisions of the bill.

1. Section 1(a) of S. 1142 would amend the indexing provisions in subsection (a)(2) of the Act. This provision now requires every agency to maintain and make available for public inspection and copying indexes of those documents having precedential significance. The proposed amendment would go further and compel all agencies to publish and distribute such indexes.

While the theory of this amendment is salutary, in practice and as a government-wide requirement it would be expensive and essentially unnecessary.



Under the existing indexing scheme, persons who ask to use the indexes are permitted to do so. However, a large segment of the public may never have the interest or the need to use them. Thus, the considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be unjustified. Even where an index does meet a need, such as a card catalogue in a library, it does not appear that the expense of publishing would be warranted.

In these cases, it is generally more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and information, rather than referring him to some index which may be largely incomprehensible because it was compiled by specialists for their own use, or to tell him to buy a published index. Moreover, a large enterprise has developed among private concerns in publishing agency materials and compiling their own indexes. For example, Congressional Clearing House and Prentice-Hall publish fully indexed tax services. To require the government to index and publish the same material would be an inefficient and expensive duplication of function.

We recommend that this amendment not be adopted until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, or until possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date and less costly have been considered.

2. Section 1(b) of the bill would amend Subsection a(3) of the Act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." We view this change to be essentially a matter of semantics and thus unnecessary. The Senate Report in explaining the use of the term "identifiable" in the present Act, stated: "records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records."

Because it does alter the wording of the statute, this amendment might lead to confusion as well as to unwarranted withholding of requested records. An unsympathetic official might reject a request which would have to be processed today, on the new ground that the request is not reasonably descriptive. Also, this amendment could subject agencies to severe harassment, as where a requester adequately described the Patent Office records he sought, but his request was for about 5 million records scattered through over 3 million files. A court, presumably unable to accept anything so unreasonable, held that the request was not for "identifiable records." *Irons v. Schuyler*, 465 F.2d 608 (Cir. 1972). Accordingly, we conclude that this change would not be desirable at this time.

3. Section 1(c) of the bill would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request and 20 working days to decide an appeal from any denial. The purpose of imposing these deadlines is to expedite agency action on requests for information. The time limits are absolute and no extensions are permitted. As the Attorney General explained in his testimony before your subcommittees, agencies should respond to such requests as expeditiously as possible, however this amendment is far too rigid for permanent and government wide application and is likely to be counter-productive to the ultimate purpose of optimizing disclosure by discouraging the careful and sympathetic processing of requests.

4. Section 1(d) of S. 1142 would impose an automatic requirement in any suit under the Act for an *in camera* inspection by the court, and if the records were withheld under the 1st exemption the court would further be directed to decide whether disclosure would injure foreign relations or national defense. These provisions, and the Department's opposition to them were discussed at length by the Attorney General in his testimony.

5. Section 1(e) would reduce the present 60-day period which the Government normally has to answer complaints against it in federal court to 20 days for all suits under the Act. It would also provide for an award of attorneys fees to the plaintiff in any such suit in which the government "has not prevailed," leaving it unclear what might happen in cases where the government prevails on part of the records in issue but does not prevail on the rest.

We oppose both features of this section. When a suit is filed under the Act, the local U.S. Attorney ordinarily consults the Department of Justice. The Department in turn must consult the agencies whose records are involved, and frequently that agency must coordinate internally among its headquarters components or

its field offices, and sometimes externally with other agencies. Because the federal government is larger and more complex, and bears more crucial public interest responsibilities than any other litigant, it needs more time to develop and evaluate its positions, especially if they may affect agencies other than the one sued. A 20-day rule would require that decisions be made without ample time for comprehensive study and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for both parties and the courts.

Furthermore, in a type of litigation which can be initiated by anyone without the customary legal requirements of standing or interest or injury, the award of attorneys fees is particularly inappropriate. It is difficult to understand why there should be departure in this area of law from the traditional rule, applied in virtually every other field of Government litigation, that attorneys fees may not be recovered against the Government.

Plaintiffs involved in Information Act cases often have less financial need for these proposed awards than in other types of litigation, because under the Act the burden of proof is upon the defendant, and because the expense of an evidentiary trial with oral testimony is rarely encountered. Moreover, although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well be a businessman using the Act to gain information about a competitor's plans or operations. Or he may be someone seeking a list of names for a commercial mailing list venture. In all such cases, the obvious end result if attorneys fees were awarded would be that the taxpayers would pay for litigating both sides of the dispute.

6. Section 2(a) of S. 1142 would amend the second exemption to restrict it solely to internal personnel matters and exclude any other internal operating matters. The House Report which preceded enactment of the Act expressly construed this exemption to cover certain operating instructions, the disclosure of which might cripple effectiveness in agency operations.

We believe that analysis is still valid today for the reasons advanced by the Attorney General in his appearance before your subcommittees. If laws are to be fairly and diligently enforced and Congressional programs effectively implemented, agencies must be able to give instructions and guidance to their own staffs without exposing these instructions, routinely and under compulsion of law, to the very persons whom the agencies must investigate, audit, regulate, inspect, or negotiate with. The moment such operations become predictable, their usefulness is destroyed. Accordingly, we believe an amendment of exemption 2 which would expressly protect such operating rules used for purposes similar to those described above would be desirable.

7. Section 2(b) of this bill would amend the fourth exemption. This exemption is designed to assure the confidentiality of information submitted to the government by private persons, usually businessmen, who would otherwise refuse to furnish such information voluntarily or customarily release it to the public. The proposed amendment would limit this protection to business-type confidential information.

As the Attorney General stated the Department opposes an amendment which would place confidential information of the type likely to be furnished by businessmen in a favored class as compared to information furnished confidentially by other citizens which also deserves protection.

8. Section 2(c) would amend the sixth exemption. As now written, this provision exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The amendment would change the word "files" to read "records." It appears this change is predicated upon the assumption that agencies may place in "files" documents or records which should not be in those files and which the public should have a right to know about. Although we are not aware of any incident in which this has actually happened, we agree that the existing exemption should be interpreted along the lines of the proposed amendment and that records which would not otherwise be exempt should not be withheld merely because they are contained in a personal file.

9. Section 2(d) of the bill would amend the seventh exemption, which covers "investigatory files compiled for law enforcement purposes" in several respects. The word "files" would be changed to "records," the phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest," and the exemption's coverage



would be restricted to exclude (i) records of scientific tests, (ii) inspection records relating to health, safety or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking.

In his statement, the Attorney General described how these changes would seriously impair our ability to enforce the laws. He also noted that the Administrative Law Section of the American Bar Association opposed these changes in the seventh exemption on similar grounds and had recommended an alternative approach which would set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objections would be frustrated were the information disclosed. Under their proposal only that material contained in an investigatory file compiled for law enforcement purposes which would disclose informants or investigative techniques, interfere with enforcement proceedings, or deprive a person of the right to a fair trial could be withheld.

Although not agreeing that exemption 7 should be amended, the Attorney General suggested that, if a fresh approach is needed, a modified version of the ABA's proposal be considered. This suggestion provides that information contained in an investigatory file pertaining to a pending or contemplated law enforcement proceeding or investigation is exempt in its entirety from disclosure. All other files are publicly available except to the extent that the production would impair a person's right to a fair trial disclose informants, investigatory techniques or jeopardize law enforcement personnel, their families or assignments, or damage the reputation of innocent persons. As such, this approach serves a dual purpose. It protects the law enforcement efficiency of this and other Departments as well as the privacy or confidentiality of any individual mentioned in such files, and, at the same time, permits public access to much of the material contained in these files.

The approach, however, was not intended to encompass FBI files or those of similar agencies whose primary responsibility is to investigate criminal activities. According to the legislative history of the Act, the seventh exemption was not to affect the FBI's investigative files at all. Therefore, this proposal was directed to those agencies and divisions of the government which perform investigative activities merely as an incident to their other statutorily imposed functions. For example, the Agriculture Department is charged with the responsibility of regulating and inspecting meat processors to ensure wholesome products. Part of that obligation includes the power to investigate and recommend the filing of criminal charges for noncompliance with inspection standards. Investigatory files compiled by Agriculture in this connection would thus be made available for public inspection under this approach subject only to the deletion categories and providing no enforcement action was pending.

Because, however, there may be some misunderstanding as to which agency files are available under the proposal suggested by the Attorney General above and because there is a legitimate public interest in obtaining information of an historical interest, we propose that the following language be added to it. Immediately after the words "Provided, That" we suggest the insertion of the clause "with respect to files compiled by noncriminal law enforcement agencies or files compiled by criminal law enforcement agencies that are more than — years old."<sup>1</sup> The proposal would then read as follows:

"The provisions of this section shall not be applicable to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency: *Provided, That* with respect to files compiled by noncriminal law enforcement agencies, or files compiled by criminal law enforcement agencies that are more than — years old, this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication,

<sup>1</sup> The Department does not express a judgment as to a specific time limit for general access to "closed" investigatory files that would accommodate vital law enforcement interests. By order dated July 11, 1973 the Attorney General instituted an experimental program granting historical researchers limited access to files of particular historic interest that have been "closed" 15 years or more. The program is as yet untested. Further experience may indicate whether this time period is sufficiently long to protect the legitimate concerns of law enforcement agencies.

(C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments."

By addition of this language, public access to investigatory files is further liberalized and the distinction between the availability of public access to the files of noncriminal law enforcement agencies and criminal law enforcement agencies, such as the FBI, is made clear. Under this approach the public is given public access to all the investigatory files of noncriminal law enforcement agencies once there is no longer pending or contemplated a law enforcement proceeding or investigation. Of course, the material contained in these files is subject to deletion if it fits within one of the enumerated deletion categories or if it concerns a matter which is exempt under one or more of the other exemptions of the Act. On the other hand, all information contained in an FBI or similar agency file which is within the statutory period is exempt from compulsory disclosure regardless of whether or not an enforcement proceeding or investigation is pending or contemplated. Such files that are not within the statutory period and which are "closed" are not exempt. Names of informants, defamatory material affecting innocent persons, *etc.* would still be subject to deletion however. This approach therefore permits the public, especially historical researchers, to gain some access to even criminal law enforcement agencies' records.

In sum, although we do not believe that an amendment of exemption 7 is needed at this time, we believe, if it is decided to amend it, that the proposal outlined above represents a reasonable compromise between the interests of the public's right to know and the protection of the integrity of the law enforcement process.

10. Section 3 of the bill would require every agency in the Executive branch to furnish any information or records in its possession to Congress upon request. In our opinion, this provision involves a direct attack on the separation of powers system established by the Constitution, and is therefore unconstitutional.

11. Section 4 of S. 1142 would require each agency to submit an annual report to Congress containing a statistical evaluation of the duties executed in administering the Act. Congress certainly has an interest and responsibility to keep informed on how the Act is being administered. Accordingly, we support the general objectives of this amendment. Nevertheless, we do not believe that legislation is necessary to accomplish this end. In the past, agencies have appeared before committees of both houses of Congress on numerous and discussed their administrative operations. Statements, complete with statistical information, have been submitted on those occasions for congressional review. Similar information as that proposed to be included in the annual reports was obtained by the House Committee on Government Operations in 1971 by means of a questionnaire. These methods have the obvious advantage of flexibility and enable Congress to receive the information it needs without being locked into a fixed system of reporting requirements. For this reason, the provision seems undesirable.

In view of the foregoing, the Department of Justice recommends against the enactment of this legislation in its present form.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Cordially,

MIKE McKEVITT.

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THE GENERAL COUNSEL OF THE TREASURY,  
Washington, D.C. August 2, 1973.

HON. EDMUND S. MUSKIE,  
*Chairman, Subcommittee on Intergovernmental Relations, Committee on Government Operations, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1142, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

Section 1 of the bill proposes to amend section 552(a)(2) which places on agencies the obligation to provide designated materials and indices thereof for public inspection and copying, and subsection (a)(3) which requires agencies to make available identifiable records upon request, in order to add certain



additional requirements; section 2 of the bill would amend the exemption provisions in section 552(b) to redefine and generally restrict the exemptions; section 3 would amend subsection (c) to elaborate the requirement for the disclosure of information or records to Congress; and section 4 of the bill would add a new subsection (d) to section 552 to require certain reports to Congress on the operations of the agencies under the Act. The views of this Department on each of the specific proposals will be discussed in order.

Section 1(a) of the bill would amend the provision requiring agencies to maintain and make available for public inspection and copying a current index identifying the information required to be made available for the public by changing this requirement to a duty to "promptly publish, and distribute (by sale or otherwise) copies of" such index. Indices of those Treasury materials required by section 552(a) (2) to be made available to the public, which are of substantial interest to the public, are now published and made available for sale. These indices are those of the precedential rulings of the Internal Revenue Service and the Bureau of Customs, which are published in bound volumes by the Government Printing Office. However, the proposed requirement of publication of indices of all materials now made available for copying by those members of the public interested therein would demand the expenditure of time and money by the agencies not warranted by the public benefit. This is particularly true with respect to the materials originated in the bureaus and offices of this Department which are not responsible for law enforcement. These materials generally consist only of statements of policy and internal instructions. Experience has shown that there has been almost no interest by the public in these materials. If the amendment contemplates by the requirement to "publish and distribute" the publication by the Government Printing Office, or a similar formal publication by an agency authorized to undertake printing, the requirement would place a serious burden upon Government publication facilities not justified by the demand. We believe the present system of making copies of unpublished indices available upon request, at cost of photocopy, to be preferable.

Section 1(b) of the bill would amend the description of the request for records to be made available to any person under section 552(a) (3) from a request for "identifiable" records to a request which "reasonably describes such records." The basic regulations of this Department under the Freedom of Information Act presently define the term "identifiable" as "reasonably specific description of the particular records sought which will enable a Treasury employee to locate the requested record" (31 CFR 1.3(f)). Consequently, we see no need for this amendment.

Section 1(c) of the bill would impose rigid time limits for responding definitively to requests for records; namely, 10 days from date of receipt of the request for making the original determination of disclosure or nondisclosure, and 20 days after the receipt of an appeal for making the final determination. The bill proposes to enforce the rigid time table by providing that if an agency fails to comply therewith, the person making the request shall be deemed to have exhausted his administrative remedies.

The Department has recognized the importance of time limitations in the handling of requests for information and in taking action on appeals. On June 5, 1973, Secretary Shultz promulgated Administrative Circular No. 159, Revised, on Disclosure of Records under the Freedom of Information Act, which provides directives on disclosure operations. Among these are requirements for response to requests for records within 10 days and for action on appeals within 20 days, but each requirement recognizes that definitive responses cannot always be provided within these time frames. The guidelines indicate acceptable reasons for a more extended period of consideration, but provide that in such instances appropriate acknowledgements are to be made within the time limitations. These guidelines were promulgated after a thorough consideration of the time-limit question in the Department. It was the consensus of all responsible officials that the setting of time limitations, with no exception for the review of complex and extensive records, or for the meeting of other difficulties inherent in response to requests, would endanger intelligent review and action. It is our opinion that the public would be ill served by adherence without exception to a rigid time frame.

Section 1(d) would amend the judicial review provisions in section 552(a) (3) to provide that the courts may determine in camera whether the records sought to be withheld by the agency may properly be withheld under any of the exemptions in section 552(b), including specifically records claimed to be exempt by reason of national security classification under exemption (b) (1). The Supreme

Court held in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) that the Act did not intend to submit to judicial review at the instance of any inquirer the soundness of the executive's national security classifications. We believe this is the proper principle and that the Act should not be amended in this regard. Under the present (b) (1) Executive Order, No. 11652, the classification of any document classified more than 10 years must be reconsidered at the request of any person.

Section 1(e) would add a provision which would allow the United States only 20 days to answer a complaint under the Freedom of Information Act and would provide that reasonable attorneys' fees and other litigation costs may be assessed against the United States in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed. It is believed that the 20 day period proposed for answer by the United States is unrealistic in light of the absolute necessity of meaningful consultation between the affected agency and the Department of Justice. In the case of civil actions involving the United States as a party defendant, the Government, as a matter of practice, is normally allowed three times the period of time accorded to private party defendants (20 days) in which to respond. It is suggested that the same considerations prompting that exception are equally applicable to civil actions involving litigation under the Freedom of Information Act.

Section 2412, title 28, United States Code, prohibits the assessment against the United States of attorneys' fees unless such liability is expressly provided for by statute. The Department defers to the views of the Department of Justice on the matter of allowing the assessment of attorneys' fees against the United States when a court rules against the agency in a Freedom of Information case.

Section 2 of the bill proposes to amend several of the exemptions in section 552 (b) ; namely, exemptions (2), (4), (6) and (7). Of these the Department has no objection to, or comment upon, the proposed amendment to exemption (6) which would substitute the word "records" for "files."

The amendment to section 552(b) (2) would confine the exemption for internal practices of any agency to "internal personnel practices of any agency and the disclosure of which would unduly impede the functioning of such agency." The restriction of the amendment to internal personnel practices apparently would, in effect, codify the interpretation given to this provision in the Senate Committee report on the legislation which became the Freedom of Information Act, as opposed to that in the House Committee report, in conformity with a recent decision in the 6th Circuit Court of Appeals. The Court's decision may not be the final conclusion on this point, but, in any case, it is one which we believe should be modified rather than codified in any amendment to this exemption. There are internal management operations which the House Committee report recognized should be withheld from public disclosure. We believe that any amendment of this exemption should allow for such withholding.

The amendment to exemption (4) would narrow its scope. The Department defers to the views of the Department of Justice on this amendment.

The amendment to exemption (7) would, first, restrict the investigatory records protected to those compiled for any "specific" law enforcement purpose. The insertion of "specific" would, if narrowly construed, be asserted as a reason to deny the exemption in a broad inquiry which had not yet been brought to focus on specific persons. Consequently, the insertion might hamper law enforcement.

Exemption (7) would also be amended to compel the disclosure of portions of investigatory files which are in the nature of scientific tests, reports or data, inspection reports relating to health, safety, and environmental protection, and records constituting the basis of public policy statements, regardless of the fact that the materials would not be available to a private party in litigation and without reference to whether such disclosure would be in the public interest. The Department does not favor this proposal. The legislative purposes underpinning the investigatory exemption were (1) to prevent the premature disclosure of the results of an investigation so as not to prejudice or interfere with enforcement efforts, and (2) to keep confidential sources of information and in some cases the procedures by which the investigation was conducted and by which the Government has obtained information. The necessity of this protection is not vitiated by the fact that the materials sought are scientific tests, reports or other records which form the basis for policy statements. We can see no basis for releasing information which if released would interfere with law enforcement.

Section 3 of the bill would amend section 552(c) by extending the present provision stating that the Act does not authorize the withholding of information



from Congress. The amended provision would require an agency to furnish any information or records to Congress, or any committee of Congress, and would define a committee of Congress as including subcommittees and joint committees. We defer to the views of the Department of Justice on the constitutional issue involved in this amendment.

Section 4 of the bill would require each agency to submit an annual report to the Government Operations Committees of both Houses which would include such statistics as the number of requests for records under section 552(a), of denials and appeals, of the days consumed in taking action, and of litigation complaints. Although this Department has no objection to filing suitable reports and has reported to the House Subcommittee on Foreign Operations and Government Information much of this type of data, we see no need for statutory language to accomplish this purpose. Any statutory requirement for reports, however, should make clear the coverage intended. Technically, requests for records covered by section 552(a)(3) refers to all records not made available by the agency under section 552(a)(1) and (2). However, this Department, and probably most agencies, receive thousands of requests for information and records without any reference to the Freedom of Information Act, which are handled routinely. If the statistics to be assembled for report to Congress are to provide a meaningful disclosure of operations under the Act, the requests to be reported should be confined to those which have been submitted as Freedom of Information Act requests or which have been denied under the authority of that Act.

In view of the foregoing considerations, we do not favor the enactment of S. 1142 in the present form.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

EDWARD C. SCHMULTS,  
*General Counsel.*

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[From the Congressional Record, Apr. 10, 1973]

#### REMARKS OF SENATOR ROTH ON INTRODUCING S. 1520

MR. ROTH. Mr. President, on behalf of the senior Senator from North Carolina, Senator SAM ERVIN, and myself and other Senators. I am today introducing legislation designed to be responsive to the serious problem of overprotection of information by the executive branch. Our bill would create a special, temporary commission to examine all aspects of executive secrecy to determine what changes are needed to insure the maximum disclosure of information consistent with our national security requirements. This bill is a direct successor to the bill we introduced last year, S. 3787.

The events of the past 2 years have convinced me that a reexamination of our secrecy laws and practices is needed more than ever. There is widespread public doubt that the electorate and the Congress is receiving the information that is needed to make wise choices about public policy. This doubt is reflected in the continuing currency of the term "credibility gap" and in the willingness of certain segments of the press to disregard classification labels on information they have received on the grounds that it ought to be made available to the public.

What is needed, it seems to me, is a more careful, more discriminatory system of classifying and disclosing information that will effectively protect the information that needs—for compelling reasons—to be protected and disclose everything else. Such a system should restore the faith of the public and the Congress in the information processes of the executive branch, and it should also increase respect for and enhance the protection of information which must, in the public interest, be classified.

In saying that a review of present laws and practices is needed, I do not mean to belittle the progress that has been made in the past few years in rationalizing executive branch classification and declassification practices. The publication of the Department of State's Foreign Relations series has been accelerated, a more progressive and up-to-date Executive order has been promulgated, and an interagency committee has released, pursuant to requests under the Freedom of Information Act, documents that were previously classified, overruling earlier departmental decisions not to release.

These steps, however, have not reversed deep-seated bureaucratic attitudes against releasing information. The intention of the Freedom of Information Act, for example, has been undermined by bureaucratic redtape and administrative delays and fees that effectively prevent the ordinary citizen from getting information to which he is rightfully entitled. There also continues to be very critical informational problems for the Congress. I find it extremely disturbing when the Comptroller General reports that he is unable to obtain access to information needed in order to make investigations and evaluations required by the Congress.

In practical terms, our problem may be less one of the drafting of new laws and regulations regarding secrecy than one of insuring compliance with the present injunctions against overclassification. In classifying, many gray areas arise, and there are strong temptations to protect when revelation is embarrassing, potentially embarrassing, or just plain inconvenient. In the absence of strong contrary pressures, it is probably easier and safer to classify than not to classify. Unfortunately, there is an inherent tendency in bureaucracies to protect simply as a matter of promoting the bureaucracy's own interests. In this, I think, there is a tendency for our bureaucrats to forget that they are the servants of the public will rather than its master.

A number of concerned Congressmen have made proposals designed to deal with these problems. Congressmen MOORHEAD and Senator MUSKIE, in separate bills in the last session, both suggested the creation of an independent classification review commission with powers to enforce appropriate secrecy laws and ensure the maximum disclosure of information. I also have drafted legislation along this line, but in the process of doing so, I have become convinced that the Congress is not yet in a position to impose any particular solution nor would the executive branch accept one until a more definitive assessment of current problems and the best solution is available.

The bill we are introducing today will provide such an assessment. Because we are dealing with such a broad problem—the balance between the public's right to know and the need to classify certain information to protect the public interest—a Commission representing both Houses of Congress, the media, and experts appointed by the President is appropriate. As part of its responsibilities, the Commission would study the desirability of establishing an independent agency to ensure the fullest possible disclosure of information and make specific proposals on the composition, duties, and powers of such an agency.

I would hope that this bill gets early and favorable consideration. It is important that we move rapidly to ensure a free flow of information to the public and to Congress. As James Madison once wrote:

A popular government without popular information or the means of acquiring it, is but a prolog to a farce or a tragedy or perhaps both.

Popular information, I submit, is conducive to a knowledgeable electorate to prudent and enlightened legislation, and to a responsible, responsive, and incorruptible bureaucracy. In short, public business contributes to a better and more perfect democracy. I ask unanimous consent that the bill be printed immediately after these remarks in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:



93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 1520

## IN THE SENATE OF THE UNITED STATES

APRIL 10, 1973

Mr. ROTH (for himself, Mr. ERVIN, Mr. ABOUREZK, Mr. BAYH, Mr. BROCK, Mr. CLARK, Mr. CRANSTON, Mr. HART, Mr. MCINTYRE, Mr. MONDALE, Mr. PASTORE, Mr. PELL, Mr. SPARKMAN, Mr. STEVENSON, and Mr. WILLIAMS) introduced the following bill: which was read twice and referred to the Committee on Government Operations

## A BILL

To establish a commission to study all laws, and executive branch rules, regulations, orders, and procedures, relating to the classification and protection of information for the purpose of determining their consistency with the efficient operation of the Government, including the proper performance of its duties by the Congress, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 ESTABLISHMENT OF COMMISSION

4 SECTION 1. There is hereby established the National  
5 Commission on Executive Secrecy (hereinafter referred to  
6 as the "Commission").

## 2

## 1 MEMBERSHIP

2 SEC. 2. The Commission shall be composed of seven  
3 members appointed as follows:

4 (1) two appointed by the President of the Senate  
5 from Members of the Senate;

6 (2) two appointed by the Speaker of the House  
7 of Representatives from Members of the House of Rep-  
8 resentatives; and

9 (3) three appointed by the President of the United  
10 States from private life, not less than one of whom  
11 shall be a representative of the press.

12 Members of the Commission shall be appointed within thirty  
13 days following the date of enactment of this Act.

## 14 ADMINISTRATIVE PROVISIONS

15 SEC. 3. The Chairman of the Commission shall be  
16 elected from the membership by the members of the Com-  
17 mission. Any vacancy in the Commission shall not affect its  
18 powers but shall be filled in the same manner in which the  
19 original appointment was made. Four members of the Com-  
20 mission shall constitute a quorum for the transaction of  
21 business.

## 22 DUTIES

23 SEC. 4. (a) The Commission shall—

24 (1) conduct a study of all laws, and of all rules,  
25 regulations, and orders, relating to the classification and



1 protection of information, and the practices and proce-  
2 dures of Federal agencies with respect to such matters  
3 for the purpose of determining what reorganization, if  
4 any, of the executive branch needs to be made to insure  
5 full disclosure of information, consistent with the security  
6 of the United States;

7 (2) determine which such laws, rules, regulations,  
8 orders, and procedures are necessary, appropriate, and  
9 consistent with (A) the freedoms of speech, press, and  
10 assembly guaranteed by the first amendment to the Con-  
11 stitution, (B) the provisions of section 552 of title 5,  
12 United States Code, relating to freedom of information,  
13 and (C) the efficient and equitable operation of Govern-  
14 ment, including the proper performance of legislative  
15 duties by the Congress of the United States, with due  
16 regard to the protection of the security of the United  
17 States;

18 (3) determine what, if any, modifications of exist-  
19 ing laws, rules, regulations, orders, and procedures are  
20 required to insure a more efficient, equitable, and uniform  
21 system for maximum possible disclosure of information,  
22 consistent with the security of the United States;

23 (4) make specific proposals for legislation or other  
24 governmental action to preserve and protect the se-  
25 curity of the United States in a manner consistent with

## 4

1 the right of the people of the United States to full dis-  
2 closure of information relating to their Government;

3 (5) make specific proposals for legislation or other  
4 governmental action to insure that the Congress receives  
5 all information necessary for the proper performance of  
6 its legislative responsibilities; and

7 (6) determine whether an independent agency  
8 should be established to insure the maximum disclosure  
9 of such information in a manner consistent with the na-  
10 tional security, and present specific proposals relating  
11 to the composition, duties, and powers of such an agency,  
12 if the Commission determines that such an agency  
13 should be established.

14 (b) The Commission shall make such interim reports  
15 of its findings and recommendations as it deems advisable,  
16 and it shall make a final and complete report of its findings  
17 and recommendations to the Congress and the President not  
18 later than March 1, 1974. Sixty days after the submission  
19 of its final report, the Commission shall cease to exist.

## 20 POWERS

21 SEC. 5. (a) Subject to such rules and regulations as  
22 may be adopted by the Commission, the Chairman shall  
23 have the power to—

24 (1) appoint and fix the compensation of an Execu-  
25 tive Director, and such additional staff personnel as he



1       deems necessary, without regard to the provisions of  
2       title 5, United States Code, governing appointments in  
3       the competitive service, and without regard to chapter  
4       51 and subchapter III of chapter 53 of such title relat-  
5       ing to classification and General Schedule pay rates,  
6       but at rates not in excess of the maximum daily rate  
7       of basic pay then currently being paid under the General  
8       Schedule under section 5332 of such title;

9               (2) procure temporary and intermittent services to  
10       the same extent as is authorized by section 3109 of title  
11       5, United States Code, but at rates not to exceed \$100  
12       a day for individuals; and

13              (3) hold such hearings, sit and act at such times  
14       and places, administer such oaths, and require by sub-  
15       pena or otherwise the attendance and testimony of such  
16       witnesses and the production of such books, records,  
17       correspondence, memorandums, papers, and documents  
18       as the Commission may deem advisable. Any such  
19       books, records, correspondence, memorandums, papers,  
20       or documents which are classified or protected for any  
21       reason by any agency of the executive branch shall be  
22       transmitted to the Commission upon its request unless  
23       such books, records, correspondence, memorandums,  
24       papers, or documents were initially classified top secret  
25       and were prepared within one year preceding the date

## 6

1 of the receipt of the request for such information from  
2 the Commission.

3 (b) In the case of contumacy or refusal to obey a sub-  
4 pena issued under subsection (a) (3) by any person who  
5 resides, is found, or transacts business within the jurisdic-  
6 tion of any district court of the United States, the district  
7 court, at the request of the Chairman of the Commission,  
8 shall have jurisdiction to issue to such person an order  
9 requiring such person to appear before the Commission,  
10 there to produce evidence if so ordered, or there to give  
11 testimony touching the matter under inquiry. Any failure  
12 of any such person to obey any such order of the court  
13 may be punished by the court as a contempt thereof.

14 (c) The Commission shall be "an agency of the United  
15 States" under section 6001 of title 18, United States Code,  
16 for the purpose of granting immunity to witnesses.

17 (d) The Commission shall prescribe rules and regulations  
18 relating to the protection of classified information in its cus-  
19 tody. Each member of the Commission and any employee of  
20 the Commission who is so authorized by a majority vote of  
21 the members of the Commission may inspect any classified or  
22 other information relevant to the duties of the Commission.

23 (e) In making appointments and procuring services  
24 under subsection (a), the Chairman shall include individuals  
25 who are competent lawyers, members of the press, and such



1 other persons who may be qualified to assist the Commission  
2 in the performance of its duties.

3 COMPENSATION

4 SEC. 6. (a) A member of the Commission who is a Mem-  
5 ber of Congress shall serve without additional compensation,  
6 but shall be reimbursed for travel, subsistence, and other nec-  
7 essary expenses incurred in the performance of duties vested  
8 in the Commission.

9 (b) A member of the Commission from private life shall  
10 receive \$125 per diem when engaged in the actual perform-  
11 ance of duties vested in the Commission, plus reimbursement  
12 for travel, subsistence, and other necessary expenses incurred  
13 in the performance of such duties.

14 ASSISTANCE OF GOVERNMENT AGENCIES

15 SEC. 7. Each department, agency, and instrumentality  
16 of the executive branch of the Government, including inde-  
17 pendent agencies, is authorized and directed to furnish to the  
18 Commission, upon request made by the Chairman, such data,  
19 reports, and other information as the Commission deems nec-  
20 essary to carry out its functions under this Act.

21 AUTHORIZATION OF APPROPRIATIONS

22 SEC. 8. There are authorized to be appropriated such  
23 sums as are necessary to carry out the provisions of this Act.

## AGENCY COMMENTS

(S. 1520)

COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, D.C., May 29, 1973.*

B-173761.

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Committee on Government Operations,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: By letter of April 27, 1973, you requested our comments on S. 1520, 93d Congress, a bill which has as its stated purpose, "to establish a commission to study all laws, and executive branch rules, regulations, orders, and procedures, relating to the classification and protection of information for the purpose of determining their consistency with the efficient operation of the Government, including the proper performance of its duties by the Congress, and for other purposes."

Section 6 of the bill provides that members of the Commission shall be reimbursed for travel, subsistence and other necessary expenses incurred in the performance of duties vested in the Commission. This section places no restriction upon either the type or amount of travel expenditures for which the Government would be obligated nor does it permit the payment of either travel or subsistence in a commuted basis.

Assuming that it is not desired to make the travel expenses of such members subject to the general laws relating thereto, we believe that the bill would provide more satisfactory guidelines from the standpoint of both administration and audit and, at the same time, not result in a loss of monetary benefits if the language of section 6 were deleted and the following substituted:

SEC. 6 (a) Members of the Commission who are members of Congress shall receive no compensation for their services as such, but shall be allowed necessary travel expenses (or in the alternative, mileage for use of privately owned vehicles and a per diem in lieu of subsistence not to exceed the rates prescribed in 5 U.S.C. 5702, 5704), and other necessary expenses incurred by them in the performance of duties vested in the Commission, without regard to the provisions of subchapter I, Chapter 57 of title 5 of the United States Code, the Standardized Government Travel Regulations, or 5 U.S.C. 5731.

(b) The members of the Commission appointed from outside the Federal Government shall each receive compensation at the rate of \$125 for each day such member is engaged in the actual performance of duties vested in the Commission in addition to reimbursement for travel, subsistence, and other necessary expenses in accordance with the provisions of the foregoing subsection.

We have no other comments on the bill.

Sincerely yours,

PAUL G. DEMBLING,  
*For the Comptroller General of the United States.*

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,  
*Washington, D.C., July 27, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Committee on Government Operations,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense with respect to S. 1520, 93d Congress, a bill "To establish a commission to study all laws, and executive branch rules, regulations, orders, and procedures, relating to the classification and protection of information for the purpose of determining their consistency with the efficient operation of the Government, including the proper performance of its duties by the Congress, and for other purposes."

Upon completion of a year long study of the security classification program, the President issued Executive Order 11652, Classification and Declassification of National Security Information and Material on March 8, 1972. On May 17, 1972, National Security Council "Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information"



was issued supplementing the Order. The Order and the Directive, both of which became effective June 1, 1972, effected substantial changes in the classification, downgrading, declassification and safe-guarding system. The basic thrust of the Order is to assure that information regarding the affairs of Government is made readily available to the public to the maximum, consistent with the interests of national security. To this end, the intended effect of the Order is to classify less, declassify sooner and provide better protection for the material which truly requires protection.

A significant provision of Executive Order 11652 created the Interagency Classification Review Committee to provide a means for centralized oversight of the implementation of the Order. More specifically, this Committee is charged with overseeing departmental actions to ensure compliance with the Order and the National Security Council Directive, receiving and taking action on suggestions and complaints with respect to administration of the Order, and, in consultation with the affected Department or Departments, assuring that appropriate action is taken on such suggestions and complaints. The Committee is also charged with seeking to develop means to (a) prevent overclassification, (b) ensure prompt declassification, (c) facilitate access to declassified material and (d) eliminate unauthorized disclosures of classified information.

On April 24, 1973, the Interagency Classification Review Committee submitted to the President its first Progress Report, providing an evaluation of progress achieved during the first ten months of operations under the Executive Order 11652. In this report, which has been made public, substantial developments and achievements are reported. As the Committee notes, however, the real test of the success of the Order, will require a longer time span in view of the extensive changes which the Order made.

In the Interagency Committee's report specific reference is made to certain activities and accomplishments of the Department of Defense. In addition, the Department has taken other significant steps to ensure effective implementation of and compliance with Executive Order 11652 and the National Security Council Directive. Pursuant to Department of Defense Directive 5200.1, dated June 1, 1972, Department of Defense Information Security Program Regulation 5200.1-R was issued providing uniform principles, policies, criteria, standards and procedures for the classification, downgrading, declassification, marking and safe-guarding information requiring protection from unauthorized disclosure in the interest of national security. This Regulation has been distributed worldwide, and applies to all activities of the Department of Defense.

The Department has set up a broad and active monitorship of the Program. On-the-site surveys are being conducted of the operations of various elements of the Department and in defense industrial facilities. From these surveys, useful innovations for the betterment of the Program and precautionary measures to preclude improper actions are identified and summarized and sent to all elements of the Department. Commands are requested to advise of the steps taken by them to correct deficiencies and to improve the effectiveness of administration of the Program.

In addition to educational and training programs conducted at the operational level, steps have been taken to establish formal resident and mobile training courses department-wide. These courses will provide comprehensive and detailed instructions covering all phases of the Information Security Program. They will be available to Government and industry personnel at management and operational levels. Also, they will form the basis for the development of on-the-job training materials and for locally instituted training sessions for all persons who are responsible for the correct application of established principles in day-to-day operations.

With respect to requests for release of information under the Freedom of Information Act, the Department of Defense is now staffing with the military departments a number of proposed changes to the governing Departmental Directive. The proposed revisions are for the purpose of implementing Recommendation No. 24 of the Administrative Conference of the United States which provides for improvements in the administration of the Act, including time limits for responding to requests. The proposals also incorporate recommendations from the Congress, and judicial interpretations of the Act.

In light of these developments, the Department of Defense believes that significant progress has already been made in achieving the objectives which the National Commission would address. Consequently, the Department of Defense recommends that no action be taken on the bill.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

L. NIEDERLEHNER,  
*Acting General Counsel.*

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EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
*Washington, D.C., July 26, 1973.*

Hon. SAM J. ERVIN, Jr.,  
*Chairman, Committee on Government Operations, U.S. Senate, New Senate  
Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: This is responds to your request of April 27, 1973, for the views of the Office of Management and Budget on S. 1520, a bill "To establish a commission to study all laws, and executive branch rules, regulations, orders, and procedures, relating to the classification and protection of information for the purpose of determining their consistency with the efficient operation of the Government, including the proper performance of its duties by the Congress, and for other purposes."

For the reasons set out in the report which the Department of Defense is submitting to your Committee on this bill the Office of Management and Budget recommends that no action be taken on S. 1520.

Sincerely,

WILFRED H. ROMMEL,  
*Assistant Director for Legislative Reference.*

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[From the Congressional Record, May 31, 1973]

#### REMARKS OF SENATOR MATHIAS ON INTRODUCING S. 1923

AMENDMENT OF THE LEGISLATIVE REORGANIZATION ACT OF 1970 TO REQUIRE ALL  
FEDERAL AGENCIES TO KEEP CONGRESSIONAL COMMITTEES FULLY AND CURRENTLY  
INFORMED

Mr. MATHIAS. Mr. President, from the earliest days of the Republic it has been a premise of our Democratic government that the shared wisdom of those elected to carry out the public will should be based on the fruits of deep and considered full inquiry. It is both sensible and necessary that those given the responsibility by the Constitution to make decisions about our national policy should have the best and fullest information available to guide them. Unfortunately, the Congress of the United States, for a variety of reasons, has been as well informed as recent situations have demanded. Decisions of great consequence have been acceded to by the Congress without the necessary facts and such inquiries as have been made by the Congress from time to time, have been stymied all too often by a refusal on the part of the executive branch to furnish necessary information. It is vital to have the relevant facts and alternatives before decisions are made; all too often information has been supplied to the Congress after decisions have been made by the executive branch. All too often a chain of irreversible events has been set in motion which has prevented alternative policies from being acted upon or even considered. The result of this practice has been the entanglement in destructive policies, some of which, such as our Vietnam involvement have cost the United States the lives of tens of thousands of its youth, the loss of revenue and resources and the diminishing of U.S. influence and reputation in the world.



I do not question the motives of these who advocated the pursuit of past policies which have turned out to be failures. But what I do question is the process by which we have become committed to such disastrous policies. A large part of the blame for these failures lies with the Congress itself. The Congress has not taken the steps it can take to assure that it has the full information necessary to make sound judgments about the purposes, goals and programs of this Government. It is a plain fact that the Congress of the United States is not as well informed as it should be. Members of the Senate and House, whether they serve on committees which examine questions of defense or foreign policy or of agriculture or those that concern the judiciary—members of all of the committees of the Congress no matter what their jurisdiction, have not been able to carry out fully, or even adequately, their responsibilities, because of a lack of necessary information.

Many in the Senate and the House have spoken about the need for reform—the need for the Congress to improve its capabilities and performance so that the legislature of the United States can better serve the people who have elected them. It is a reason for hope that steps are being taken by both Houses once again to enable the Congress to assume responsibility for the appropriations process. The Congress has recognized that the practical and sensible steps taken by the executive branch enabling it to function with effect in a complex modern superstate, such as the creation of Office of Management and Budget and its predecessor agencies have relevance to the Congress. The Congress is only now beginning to give itself a similar capability, but at this point we can only hope for significant change.

Article I of the Constitution specifies that Congress shall make the laws. If this responsibility of the Congress is to have purpose and effect, it will require changes, and changes now, in the procedures of the Senate and the House. A vital first step is to assure that full and timely information will be available to the Congress and to adapt our committees in order to make use of this information.

To this end, Senator ERVIN and I introduce today a bill which would amend the Legislative Reorganization Act of 1970 and require all Federal agencies to keep congressional committees and any subcommittee thereof fully and currently informed.

I send the bill to the desk and ask for its appropriate referral.

The PRESIDING OFFICER. The bill will be received and appropriately referred.

93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 1923

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## IN THE SENATE OF THE UNITED STATES

MAY 31, 1973

Mr. MATHIAS (for himself, Mr. ERVIN, and Mr. MANSFIELD) introduced the following bill; which was read twice and, by unanimous consent, referred to the Committee on Government Operations

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## A BILL

To amend the Legislative Reorganization Act of 1970 to provide that Federal agencies keep congressional committees fully and currently informed.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That (a) title III of the Legislative Reorganization Act of  
4       1970 is amended by adding at the end thereof the following  
5       new part:

6       “PART 4—KEEPING THE CONGRESS INFORMED

7       “INFORMING CONGRESSIONAL COMMITTEES

8       “SEC. 341. (a) Every Federal agency shall keep each



1 standing committee of the Senate and the House of Rep-  
2 resentatives fully and currently informed with respect to all  
3 matters relating to that agency which are within the jurisdic-  
4 tion of such committee. Every Federal agency shall furnish  
5 any information requested by any such standing committee  
6 with respect to the activities or responsibilities of that agency  
7 with the jurisdiction of that committee.

8 “(b) Each such standing committee shall take appro-  
9 priate measures to insure the confidentiality of any informa-  
10 tion made available to it under this section.

11 “DEFINITION

12 “SEC. 342. For purposes of this part, ‘Federal agency’  
13 has the same meaning given that term under section 207 of  
14 this Act.”

15 (b) Title III of the table of contents of the Legislative  
16 Reorganization Act of 1970 is amended by adding at the end  
17 thereof the following:

“PART 4—KEEPING THE CONGRESS INFORMED

“341. Informing congressional committees.

“342. Definition.”.

[From the Congressional Record, June 26, 1973]

# REMARKS OF SENATOR KENNEDY ON INTRODUCING S. 2073

Mr. KENNEDY. Mr. President, I am today introducing a bill to provide a means for Congress to obtain a judicial determination of the existence of executive privilege, and its application in specific circumstances.

Traditionally executive privilege disputes have been compromised and negotiated, so that no definitive limitations on the scope of the doctrine have evolved. The Executive has on occasion taken the position that "Congress cannot, under the Constitution, compel heads of departments by law to give up papers and rather doctrinaire information regardless of the public interest involved; and the President is the sole judge of that interest." Mr. Kliendienst propounded this theory in hearings earlier this year. Members of Congress have replied, with substantial support from the academic community, that there is no executive privilege doctrine found in the Constitution thus, that Congress is the sole judge of what information is to be given to it.

In any discussion of the issues surrounding the executive privilege doctrine, certain basic principles requires recognition :

First, both practically and historically, executive privilege can apply if at all only to the advice giving process relating to decisions by the President himself. Communications among government agency officials and even activities of Presidential aides outside their duties in behalf of the President cannot be drawn within the cloak of executive privilege.

Second, the rights of Congress on behalf of the public and those of the public directly are not coequal. The special needs of Congress in fulfilling its legislative role under the Constitution and its recognized role in overseeing execution of its laws by the Executive, require that it have access to information that otherwise might not be released to public view. The Freedom of Information Act which expresses exceptions to the principle of full disclosure where the public is involved does not by its specific terms provide any limitation on congressional access to Government information.

The bill I am introducing gives a three-judge district court of the District of Columbia original jurisdiction over actions brought by the Senate, the House of Representatives, and congressional committees which challenge refusals of executive branch officials to appear, testify, or produce information. It contemplates such a suit would follow the refusal of the official to comply with a subpoena, and it provides for an override by the House or Senate of any committee-initiated action. A direct appeal to the Supreme Court would follow any initial district court decision.

This bill can be viewed as a companion to other measures introduced in the Senate, since they do not provide any remedy for any external objective considerations of the doctrine.

I recognize the fear of some that this legislation may be used by agencies as an escape valve, knowing that any refusal to provide information will result in drawn out court disputes, and that even after judicial rulings, the executive can refuse to abide by them. I think these fears are not well-founded, and more importantly, this bill would allow a test case on the existence and parameters of executive privilege. Since this is a nation of laws, Congress must presume that no man, and moreover, no official of the government of our Nation, may be above those laws.



Finally, the executive should not be the sole judge of the scope of its own privilege, without check and without standards. To allow the executive to be its own arbiter on questions of disclosure is virtually to guarantee that the determination will be based on something less than the broadest view of the public interest. This is not acceptable to the Congress, nor should it be to the public.

I think it would be a mistake for either Congress or the executive to draw too indelible a line on the issue of executive privilege. I also oppose inflexible legislation imposing automatic sanctions for wrongful or untimely invocation of the privilege. Congress already has subpoena and contempt powers. It can hold up nomination, cut off funds, or withhold authorizations.

The bill I am proposing today is consistent with these other alternatives to dealing with invocation of executive privilege. The bill does not presume the existence of an executive privilege doctrine. But since executive privilege is purported to be a constitutional doctrine, the bill gives the Federal courts the opening to delineate the extent of the doctrine if it finds the privilege in fact exists. The courts' traditional role in interpreting the Constitution is thus maintained, and I was pleased today to learn that the Attorney General also saw as natural and appropriate a judicial role in deciding executive-legislative conflicts in the executive privilege area.

The bill would also allow an objective branch of Government to demarcate the relationship between the two other branches of Government under the Constitution. Although the Congress obviously still would retain other avenues for enforcing its will, none of these has ever assisted in providing long-range resolutions on the question of what, if any, information the executive branch can keep from Congress.

93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. 2073

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## IN THE SENATE OF THE UNITED STATES

JUNE 26 (legislative day, JUNE 25), 1973

Mr. KENNEDY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

## A BILL

To authorize the Senate, the House of Representatives, and congressional committees to bring suits with respect to claims of executive privilege.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That (a) chapter 85 of title 28, United States Code, is  
4       amended by adding at the end thereof the following new  
5       section:

6       **“§ 1364. Claims of executive privilege before Congress**

7       “(a) The District Court for the District of Columbia  
8       shall have original, exclusive jurisdiction of any civil action  
9       brought by either House of Congress, a joint committee of  
10      Congress, or any committee of either House of Congress with



1 respect to any claim of executive privilege asserted before  
2 either such House or any such joint committee or committee.

3 “(b) Any such civil action shall be heard and deter-  
4 mined by three judges of such court appointed in accordance  
5 with section 2284 of this title.”.

6 (b) The analysis of such chapter 85 is amended by in-  
7 serting at the end thereof the following new item:

“1364. Claim of executive privilege before Congress.”.

8 SEC. 2. (a) Title 28, United States Code, is amended  
9 by adding at the end thereof the following new chapter:  
10 **“Chapter 177.—CLAIMS OF EXECUTIVE PRIVILEGE**  
11 **BEFORE CONGRESS**

“Sec.

“3101. Authority to sue.

“3102. Consideration by district court.

“3103. General.

12 **“§ 3101. Authority to sue**

13 “The Senate, the House of Representatives, a joint com-  
14 mittee of Congress, and any committee of either House of  
15 Congress may bring a civil action in its own name, in the  
16 District Court for the District of Columbia, to compel an of-  
17 ficer or employee of the United States to appear and testify,  
18 provide documents or other matter, or both, if that officer or  
19 employee has refused to appear and testify, or produce docu-  
20 ments or other matter, or both, because of the assertion of  
21 executive privilege.

1   **“§ 3102. Consideration by district court**

2       “(a) Any civil action brought under section 3101 of  
3 this title shall, except as to proceedings the district court con-  
4 siderers of greater importance, take precedence on the docket  
5 over all other proceedings and be assigned for hearing and  
6 trial at the earliest practicable date and expedited in every  
7 way.

8       “(b) If, upon hearing and trial, the district court finds,  
9 there is no executive privilege, or that the provision is inap-  
10 plicable, the district court shall issue an injunction to that  
11 officer or employee of the United States (1) to appear and  
12 testify, (2) produce such documents or other matter with  
13 respect to which the district court finds there is no such priv-  
14 ilege or such privilege is inapplicable, or (3) both. If the of-  
15 ficer or employee does not thereafter comply with the order  
16 of the court, the court may punish him for contempt.

17   **“§ 3103. General**

18       “(a) For purposes of this chapter and section 1364 of  
19 this title, a subpoena issued by a subcommittee of a joint  
20 committee of Congress or of a committee of either House of  
21 Congress shall be considered to have been issued by that joint  
22 committee or committee, and executive privilege asserted  
23 before a subcommittee of a joint committee, or a subcom-  
24 mittee of a committee of either House of Congress, shall be  
25 considered an assertion of executive privilege made before



1 that joint committee or committee. However, this subsection  
2 shall not be construed as authorizing such subcommittee to  
3 bring a civil action under this chapter.

4 “(b) A civil action brought by a joint committee of  
5 Congress or a committee of either House of Congress shall  
6 be immediately dismissed with prejudice by the district  
7 court if—

8 “(1) in the case of a civil action brought by a joint  
9 committee, Congress passes at any time a concurrent  
10 resolution stating that it does not favor the bringing of  
11 that action; or

12 “(2) in the case of civil action brought by a com-  
13 mittee or either House of Congress, that House of Con-  
14 gress passes a resolution at any time stating that it does  
15 not favor the bringing of that action.”.

16 (b) The table of chapters of part VI of such title 28  
17 is amended by adding at the end thereof the following:

“177. Claims of Executive Privilege Before Congress----- 3101”.

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